The Central Law Journal.

ST. LOUIS, NOVEMBER 25, 1887.

CURRENT EVENTS.

OVERT ACTS—LIBERTY OF SPEECH.—In a recent article [1] we expressed a doubt whether any efficient legislation could be framed to restrain the promulgation of sentiments, hostile to law and order and destructive of social security, which would not at the same time seriously imperil the right of free speech and the liberty of the press. We further said that, in our opinion, the penalties of the law should be limited to overt acts. That term, as we understand and mean to use it, includes every spoken or written or printed word designed or tending directly or indirectly to promote the commission of crime. Words are acts. The words of a libel are as distinctly acts as blows inflicted with a bludgeon. The law recognizes this fact and protects citizens, as well against the pen of the libeler, as against the club of the ruffian. He who counsels another to commit suicide is held guilty of murder if his advice is followed; and those who plan a burglary and instruct the actual perpetrators how and when and where to operate, are treated as accomplices. And yet they have only spoken words. Those words are spoken in darkness and in secret to three or four conspirators, but what difference can it make, except in aggrevation of the offense, that, like words, are spoken in public, under the full glare of gas-light, and to a crowded audience? In the first of these cases the law finds no difficulty; in the second, the matter is always so involved with fundamental and precious rights of free speech, that legislators and judges have been very cautious in treating it. If one man says to another, or to two or three: "go and commit a crime, approach the house by the alley, enter by the west window," if the advice is followed and robbery or murder ensue the adviser is an accomplice. If an orator at a public meeting says: "All property is theft, take anything you want, and slay any man who may resist you," he will not use these words, of course, but if this is his plain meaning, and a riot and robbery and murder are the consequences of his eloquence, why is he not an accomplice in those crimes?

Every man has in this country an absolute right to discuss, orally or in print, all theories of government, all political and politico-economical questions, abstract and concrete, all social theories, all religious or irreligious doctrines. On all these subjects discussion is perfectly free, but it is only the discussion, not the practice of theories that is free. One may argue that all property should be in common, and that individual property is wrong, but he must, nevertheless, keep his hands from "picking and stealing;" he may advocate polygamy, but he must not practice it; he may hold the doctrine of the Thugs of India, and the Assassins of Persia, that murder is meritorious and a religious duty, but he must not kill people. Theory is free as the air, but practice is strictly circumscribed by the common and statute law.

It being the duty of the legislative branch of the government to frame and enact all laws necessary to the preservation of social order, and of the courts to administer and enforce such laws, it is obviously important that the limitations imposed by the higher law of the constitution should be distinctly understood. Anarchism and communism constitute, in this country, a new danger, and in the constitution of the United States will be found no safeguards especially designed to counteract them. When that instrument was framed these pestilent social heresies were unknown, they sprang into existence a few years later in the madness of the French Revolution, and from that time to this, nearly a hundred years, have constituted a menace to peace, property, and social security in nearly every country in Europe. In this country, although we have had enough, and to spare, of native American follies and chrochets, we have had heretofore nothing of that nature, nor should we have them now except by importation. It is noteworthy that with very few exceptions the men who figure in this style of agitation, on the rostrum and elsewhere, are of foreign birth and recent importation, who have been attracted to these shores by the laxity of the laws, and who hope to find here a suitable field for the promulgation of their peculiar doctrines.

[1] 25 Cent. L. J. 457.

We may be transcending the limits of our province, but we must say that, in our opinion, the theory that this country is an asylum for the oppressed of all nations has been carried too far, and it is high time that the line should be drawn somewhere. Whether an oppressed foreigner should find an asylum in this country should be made to depend upon who oppressed him, and for what he was oppressed. Some steps have been taken in the proper direction in this matter. The immigration of known criminals and of paupers has been interdicted. Far worse than either of these classes is the political refugee whose immigration is prompted, not by hostility to the government of the country which he leaves, as by hostility to all governments whatever.

As we have already said we do not think that legislators can, without infringing rights guaranteed by the constitution, do much more than has been done, for the suspension of this noxious agitation, but whatever they can do they should do, and judges should with just severity, administer the law against all who, by overt acts, have subjected themselves to its penalties.

NOTES OF RECENT DECISIONS.

EQUITY—SPECIFC PERFORMANCE — PUBLIC POLICY—CONTRACT.—The Supreme Court of Illinois recently decided a case [1] which involves a question of much interest to the profession, to the business men of the country, and to the public generally.

The facts were, that in the city of Chicago there were two gas-light companies, duly incorporated, each of which was authorized by its charter to furnish illuminating gas throughout the city, and various privileges and immunities were conferred upon them with the privileges they enjoyed. They entered into a contract between themselves by which they mutually bound themselves not to compete with each other in certain portions of the city; or, in other words, to keep up the prices of gas in those subdivisions of the city, above those which would have been paid by consumers if the competition contemplated by their respective charters had existed. One of the companies declined to be bound by this agreement, and the other instituted proceedings to compel a specific performance of the contract.

The question presented for the consideration of the court was, whether corporations enjoying special franchises and privileges, to be exercised as well for the benefit of the public as for their own private profit, can so pervert those franchises that their exercise shall enure chiefly to the profit of the corporation at the expense and to the detriment of the community, and whether a contract entered into with that view, and with the design of controlling prices and suppressing lawful competition, so far accords with public policy that courts of equity will exert their extraordinary powers to enforce such contracts and carry them into effect? The court decided that the contract was so far in violation of public policy that neither party was entitled to ask the aid of a court of equity to enfore its specific performance.

Whether the contract in question was absolutely void in law as contrary to public policy, and whether it was *ultra vires* of the corporations which were parties to it, are questions which were not decided, as indeed they could not have been properly decided, not having been raised by the pleadings; but the decision goes far enough to indicate what will probably be the ruling of the Supreme Court of Illinois on those questions when they shall be properly raised and presented.

Meantime, we will remark that this decision is, as far as it goes, a valuable indication of the tendency of the judicial mind on a subject of much interest to the profession and to the country; that is, how far can aggregated wealth, in the shape of corporations, go in obtaining undue advantages over those with whom it deals, and whether without the aid of legislation the courts can restrict and control the deleterious effects upon the commerce of the country of "combinations," "pooling," "rings," "trusts," and other like devices, to which corporations have of late so freely resorted, and which always result in the gain of the corporations and the loss of the people.

[1] Chicago, etc. Co. v. People's, etc. Co. Sept. 26, 1887; 13 N. E. Rep. 169.

THE RIGHT TO BEGIN AND REPLY IN SPECIAL PROCEEDINGS.

II.

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§ 1. *In Proceedings on Reports of Commissioners, Auditors, Referees.*—In Indiana, on appeal from proceedings before a board of commissioners in reference to the location of a highway, where the remonstrance is for damages only, the remonstrant has the burden of proof, and is therefore entitled to open and close. The reason seems to be that if there is no remonstrance no proof will be required from the petitioners, but the report of the viewers will be final. [1] Under the Code of Georgia, the report of an auditor is *prima facie* evidence, and the burden is on the exceptor to show error in it and to make good his exceptions. When an order is made that the report be filed and granting leave and time to except thereto, the report becomes such evidence. The burden thus being on the exceptor, he is entitled to open and conclude, unless the other party introduces no testimony, in which case the right of conclusion shifts to the other party. To cross-examine a witness of the objector and to continue the cross-examination after a temporary suspension of it by the court, is not an introduction of testimony by the party so cross-examining, in such a sense as to give him the right to the conclusion.[2] In Massachusetts, where the report of an auditor is in favor of the plaintiff, and the defendant files exceptions to it, the right to open and close, in the contest raised by the exceptions, remains with the plaintiff, although the report makes a *prima facie* case in his favor, on the principle alluded to in the former article, that where the right once attaches to a party it does not shift with the shifting of the burden of proof.[3] The same conclusion has been reached in New Hampshire, in a case which was referred to commissioners under a statute, who had reported in favor of the plaintiff, the defendant electing to have the case afterwards tried by a jury, and filing, under the terms of the statute, a statement of the particulars in which he expected to change the result of the report. The court, on consideration of the state of the case and the terms of the statute, being of opinion that the issue was in substance the general issue, in which case the opening and closing is always with the plaintiff, gave the right to him.[4]

§ 2. *In Proceedings to Condemn Land and Assess Damages.*—In a proceeding to condemn land for public use and for the assessment of the compensation to be made to the land-owner, the petitioner holds the affirmative of the issue, and consequently has the right to begin and reply, both in the introduction of evidence and in the argument to the jury.[5] The reason is that the petitioner, the party seeking to condemn the land, is the moving party. Under the constitution the land cannot be taken without just compensation being made to the owner. The proceeding of the petitioner is therefore a proceeding to ascertain what is just compensation, and, should no proof be offered under this head, he would be defeated.[6]

[1] Peed v. Brenneman, 89 Ind. 252.

[2] Arthur v. Commissioners, 57 Ga. 221, 224.

[3] Snow v. Batchelder, 8 Cush. (Mass.) 513.

[4] Chesley v. Chesley, 27 N. H. 229, 237.

[5] South Park Commissioners v. Trustees, 107 Ill. 489; McReynolds v. Burlington, etc. R. Co., 106 Ill. 152; Neff v. Cincinnati, 32 Ohio St. 215.

[6] McReynolds v. Burlington, etc. R. Co., 106 Ill. 152. The contrary is held in Arkansas, the court reasoning that the land owner is the real actor. No matter which party initiates the proceeding, the court say, the extent of the damage is the object of the inquiry, and the burden of proof is upon him. Springfield, etc. R. Co. v. Rhea, 44 Ark. 258, 264, citing Mansfield's Arkansas Dig. § 5131; Pierce on Railroads, 187; Mills on Eminent Domain, § 92. On principle the burden in these cases would, however, seem to be upon the petitioner, since the petitioner cannot succeed without introducing evidence.

§ 3. *Petitioner, Claimant, Administrator.*—The right is with the applicant for a license to sell intoxicating liquors, under a statute of Indiana, in a proceeding to try his right to such a license;[7] with the claimant or creditor in case of a claim preferred against a decedent's estate which is contested;[8] with the administrator on the trial of exceptions filed to his final settlement.[9]

§ 4. *Miscellaneous Cases where the Right was held to be with the Plaintiff.*—Passing from these we come to a number of miscellaneous cases, some of which appear to have been decided according to principle and others not, which, within the limits of this article, can only be referred to without explanation or discussion. The right rests with the plaintiff in the execution in a proceeding called "claim" under a statute of Georgia where land has been levied upon;[10] but in cases of "illegality" under another statute of the same state, it is with the defendant.[11] It is with the plaintiff in a proceeding under a statute of Texas to try the right of property levied upon by execution,[12] and in an action against an administrator who pleads payment and *plene administravit*.[13]

§ 5. *Miscellaneous Cases where the Right is with the Defendant.*—In like manner the right has been held with the defendant on a plea in abatement to an action on bills of exchange, which sets up the non-joinder of a joint maker or promisor;[14] in Alabama, where the defendant in a judgment applies for a *supersedeas* under a statute, the proceeding being a substitute for the common law writ of *audita querela*;[15] in Delaware, on the trial of a *caveat* filed against proceedings to locate vacant lands under a private act of assembly;[16] and, as stated in the preceding paragraph, on the trial of an affidavit of "illegality" in Georgia.[17]

§ 6. *Express Waiver of General Denial.*—As seen in the former article, in a suit on a contract which liquidates the damages, if the defendant files no denial, but sets up an affirmative defense, the right to begin and reply is with him.[18] It has been held that this rule is capable of application in an action upon such an instrument before a justice of the peace, where no formal defensive pleading is required, but where, by the terms of the statute, the case stands as though the defendant had pleaded the general denial; in which case he may, by filing of record an express waiver of the general denial, confine himself to an affirmative defence and acquire the right to open and close.[19]

§ 7. *Failure of the Defendant to Offer Evidence.*—It is scarcely necessary to say that the failure of the defendant to offer evidence does not oust the plaintiff of his right to open and close the argument, if he otherwise has it under the rules already stated.[20] And where the defendant files a plea setting up an affirmative defense which would give him the right to begin and reply if evidence were offered under it, he does not have the right if he offers no evidence under it; for otherwise, by filing a sham plea, a defendant might acquire a right which the law does not intend to give him.[21]

§ 8. *Effect of Admitting Plaintiff's Cause of Action.*—But in Massachusetts, where the courts have been driven for the sake of convenience to adopt a uniform rule,[22] giving the plaintiff the right to open and close in all cases, the fact that the defendant admits the plaintiff's cause of action and that the only issue for the jury is on the defendant's declaration in set-off, does not shift the right to the defendant.[23] In New-

[7] Hill v. Perry, 82 Ind. 28; Goodwin v. Smith, 72 Ind. 113.

[8] Yongling v. Esson, 16 Md. 112, 121.

[9] Taylor v. Burk, 91 Ind. 252; Hanlyn v. Nesbit, 37 Ind. 284; Brownlee v. Hare, 64 Ind. 311.

[10] Baker v. Lyman, 53 Ga. 339.

[11] Bertodi v. Ison, 69 Ga. 317.

[12] Latham v. Selkirk, 11 Tex. 314.

[13] Clay v. Robinson, 7 W. Va. 350.

[14] Fowler v. Coster, Mood. & M. 241, per Lord Tenterden, C. J. This case, though decided before the rule became settled in England, is in conformity with correct principle.

[15] Persall v. McCartney, 28 Ala. 110, 125. Compare Worsham v. Goar, 4 Port. (Ala.) 441; Shearer v. Boyd, 10 Ala. 179; Grady v. Hammond, 21 Ala. 428; Edwards v. Lewis, 16 Ala. 315; Bruce v. Barnes, 20 Ala. 219.

[16] Records v. Melson, 1 Houst. (Del.) 139.

[17] Bertodi v. Ison, 69 Ga. 317.

[18] 25 Cent. L. J. 174, 175.

[19] Cross v. Pearson, 17 Ind. 612.

[20] Worsham v. Goar, 4 Port. (Ala.) 441.

[21] Daviess v. Arbuckle, 1 Dana (Ky.), 525, approving Sadousky v. McGee, 4 J. J. Marsh. (Ky.) 275, and and qualifying Goldsberg v. Stuteville, 3 Bibb (Ky.), 346.

[22] 8 Cush. 603, note.

[23] Page v. Osgood, 2 Gray (Mass.), 260. Compare Bradley v. Clark, 1 Cush. (Mass.) 293; Wigglesworth v. Atkins, 5 Cush. (Mass.) 212; Spaulding v. Hood, 8

hampshire, it is held, on somewhat doubtful grounds, that, although the defendant admits the plaintiff's claim, which he has formally denied in his answer, yet as the admission is only in the nature of evidence, it does not change the burden of proof, and does not entitle the defendant to begin and reply. "The right," says Bell, J., "depends on the form of the pleadings, and is determined by the fact that the affirmative of one of the issues is upon the plaintiff; and this is in no way affected by the circumstance that the plaintiff has greater or less facilities for making the required proof. Any material fact may be proved by the admissions of the adverse party; and it does not change the burden of proof upon the pleadings, that the defendant has admitted the claim which he formally denies by his plea. Nor is it in any way material in what form the admission is made, so long as he chooses to deny it upon the record, and join issue upon it."[24] In Texas, where the defendant files a written admission, in accordance with a rule of court numbered 31, that the plaintiff has a good cause of action as set forth in his petition, except so far as it may be defeated, in whole or in part, by the facts constituting the defense which may be established on the trial, he is entitled to open and close, both in adducing evidence and in arguing the case.[25] Under a rule of court, numbered 59, which has been in force formany years in South Carolina, the defendant is likewise entitled to begin and reply, when he admits upon the record the plaintiff's cause of action and takes upon himself the burden of proof.[26]

§ 9. *Admission of a Part of the Plaintiff's Cause of Action.*—It is scarcely necessary to say that the admission by the defendant of a part only of the plaintiff's case, or of a part only of the evidentiary facts upon which the plaintiff relies for a recovery, will not give the right to begin and reply to the defendant. Thus, in ejectment where each party claimed as heir at law, and the real question was as to the legitimacy of of the defendant, who was clearly heir if legitimate, he proposed to admit that unless he were legitimate the lessor of the plaintiff was the heir at law. It was held that the admission did not give him the right to begin.[27] So, in an action of ejectment the lessor of the plaintiff claimed as devisee under the will of J. S. At the trial the defendant admitted the seizen of J. S., and the due execution of that will, and that the plaintiff was *prima facie* entitled under it, and proposed to set up a subsequent will, revoking the first will. It was held, reversing the trial court, that the plaintiff was entitled to begin. The reasoning of the learned judges was that the lessor of the plaintiff claimed as devisee under the will, that is, under the will that was a good and valid will at the time of the testator's death; therefore the defendants proposed to admit a part only of the plaintiff's case, and in fact did set up a case which denied that the plaintiff was such devisee.[28]

§ 10. *Right to Begin Carries with It the Right to Reply.*—The right to begin, based upon this so-called primary burden of proof, carries with it the right to reply.[29]

§ 11. *Refusal of Right to Open not Cured by Granting Right to Conclude.*—The refusal to the party having the burden of proof, of the right to open his case to the jury, is an error which is not cured by according to him the right to have the concluding argument. In the opinion of the court so holding, Daly, C. J., said: "The opening of

Cush. 602, and Merriam v. Cunningham, 11 Cush. 40, 44, which were decided under a rule of the court of common pleas of that State prior to the adoption of this uniform rule.

[24] Buzzell v. Snell, 25 N. H. 474, 479.

[25] Ney v. Rothe, 61 Tex. 374.

[26] Burckhalter v. Cowerd, 16 S.C. 435, 441.

[27] Warren v. Gray, Mood. & M. 166.

[28] Doe d. Bather v. Brayne, 5 Com. Bench, 655, 670. The case was distinguished from cases where the plaintiff claims as heir at law, and where the defendant admits that the whole title of the plaintiff, that is that the ancestor dies seized and that the plaintiff is his heir at law. Doe d. Wollaston v. Barnes, 1 Mood. & Rob. 386. The court also distinguish Doe d. Corbett v. Corbett, 3 Camp. 368. On the right of the devisee to begin, see also Goodtitle d. Revett v. Braham, 4 T. R. 498; Doe d. Tucker v. Tucker, Mood. & M. 536. Several other early cases were cited in the argument: Doe d. Chamberlyne v. Lloyd, Peake Ev. 5, *n.*; Bulford v. Croke, *Ibid;* Doe d. Warren v. Bray, Mood. & M. 166; Doe d. Pill v. Wilson, 1 Mood. & Rob. 323; Doe d. Lewis v. Lewis, 1 Carr. & K. 122. But as several of these were *nisi prius* cases, decided at a period before the rule had become settled in England in the leading case of Mercer v. Whall (5 Q. B. 447), it is thought unnecessary to examine them in detail.

[29] Robinson v. Hitchcock, 4 Metc. (Mass.) 64; Judge of Probate v. Stone, 44 N. H. 593, 606; Elwell v. Chamberlin, 31 N. Y. 611, 612.

the case to the jury by the plaintiffs, and the laying before them of their evidence in the first instance, and confining the defendant to evidence in the way of reply, are a part of their legal right, of which they are deprived under exception; and I fail to see how the error is cured by allowing them afterwards what was their further right—the final address to the jury. Depriving a party of one part of his legal right is certainly not cured by allowing another part." And the judgment was reversed for this error alone, although the case had been already tried three times.[30]

§ 12. *The Right to Reply how Affected by Waiving the Right to Begin.*—Where the plaintiff waives the opening argument to the jury, it has been thought that, on strict grounds, this might give to defendant the right to close; but it was said: "If such a waiver should still leave the closing argument to the plaintiff, it certainly confined it to a strict reply to the defendant's argument, excluding general discussion of the case. The sole object of all argument is the elucidation of the truth, greatly aided, in matter of fact, as well as matters of law, by full and fair forensic discussion. And this is always imperilled when either party is able to present his views of the case to the jury without opportunity of the other to comment on them. And if the party entitled to the opening argument, relying on the strength of his case without discussion, waive the right to open, he waives the right to discuss the case generally, and should not be permitted to do so out of his order, and after the mouth of the other party is closed. His close, if permitted to close the argument, would be limited to comment on the argument of the other side. This is essential to the fairness and usefulness of juridical discussions at the bar."[31] In a civil case, where the court, after the close of the evidence, directed counsel for the plaintiff to go on and state his points relied on for a recovery, which counsel did, and the defendant's counsel then asked the court to charge the jury, but the plaintiff's counsel insisted upon his right to argue the case to the jury, which was denied him by the court—it was held that the ruling was erroneous. This holding was predicated upon the view that the court, in directing the plaintiff's counsel to state his points, meant to restrict him in his opening to a naked statement of his points, to the exclusion of argument in support of them. The reviewing court did not hold that, where the plaintiff has the privilege of argument and declines it, he is entitled to make the closing argument, although the defendant declines argument.[32] In a civil case, after the testimony is closed and the case is opened by the plaintiff's counsel, if the defendant's counsel submits the cause to the jury without argument on his part, the plaintiff is not entitled to make any further argument to the jury.[33]

§ 13. *Answers to Correspondents.*—Since the previous article appeared in print several learned correspondents have written to the undersigned, suggesting topics for consideration in this article. Some of these letters have been answered by mail to the writers. Two of them will be noticed here. A learned correspondent suggests that, in this connection it would be appreciated by the bar to hear something on the right to introduce a new cause of action in the reply, especially in equity cases. In answer to this I take leave to suggest that I am writing, not on the subject of *pleading*, but on the subject of *forensic argument*. I will, however, venture to say that no right to introduce a new cause of action in the reply exists under any correct system of pleading. If the case is one in equity and the answer makes it necessary for the plaintiff to allege new matter, he must, in the Federal courts, do so by amending his bill. Another learned correspondent calls attention to a case "where there are several defendants, and some of them, whose interests are identical with those of the plaintiff, put in the general issue, and others, whose interests are adverse to such defendants so answering, as well as to the plaintiff's complaint, admit the facts stated in the plaintiff's complaint, but set up affirmative matter in avoidance." He also suggests the following case: "A gives B a promisory note, governed by the law merchant. B assigns it by indorsement,

[30] Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 61.
[31] Brown v. Swineford, 44 Wis. 282, 290, opinion by Ryan, C. J.
[32] Cartright v. Klopton, 25 Ga. 85.
[33] Tyre v. Morris, 5 Houst. (Del.) 3.

before maturity, for value to C, who brings suit upon it against A as maker and B as indorser. B answers by the general denial, which makes it necessary for C to put the note and indorsement in evidence to recover as against B. A answers, admitting the execution of the note, but setting up a defense which, if true, would defeat a recovery on the note as against him. Would A in such a case have the right to open and close, or would B's general denial give C the right to open and close, both as against A and B?" To both of these questions the answer is furnished by what is said in sec. 4 of the preceding article, supported by numerous authorities, that where there are *several issues* and the plaintiff has anything to prove in the first instance under any one of them, in order to a recovery, the right to open and close is with him.

SEYMOUR D. THOMPSON.

SALE—DELIVERY—PASSING OF TITLE—MISTAKE—RESCISSION.

SHERWOOD V. WALKER.

Supreme Court of Michigan, July 7, 1887.

1. *Sale—Blooded Cow—Sterility—Mistake.*—The defendants were the owners of some "polled Angus cattle," and they intended to sell some cows belonging to the herd that they thought would not breed. The plaintiff called on the defendants with a view to buy some stock. They informed him that they had a few head on their "Greenfield farm," and asked him to go and see them, informing him at the time that they were probably barren. He went and examined the cattle, and a few days thereafter, in the fore part of May, he called up the Walkers by telephone and bought a cow, known as "Rose 2d," at five and a half cents per pound, live weight, fifty pounds shrinkage. The sale was confirmed by a letter, and an order for the delivery of the cow was sent by mail. The plaintiff then wrote to the agent of the defendants, informing him when he would come for the cow. When he went for the cow delivery of her was refused. He made a tender, and then brought suit for her in replevin. She calved in the following October.

2. *A Completed Sale—The Title Passed.*—*Held*, that the sale was complete and the title passed, unless the mistake of the defendants as to the fertility of the cow entitled them to relief.

3. *The Mistake went to the Substance of the Agreement.*—*Held*, that in this case the mistake went to the substance of the agreement; it was not merely as to the quality of the cow; it went to her very nature and affected her character, both for her present and ultimate use.

4. *Assent—Contract—Mistake—Material Fact.*—*Held*, that it must be considered as well settled that a party who has given an apparent consent to a contract or sale may refuse to execute it, or he may avoid it after it was completed if the assent was founded or the contract made upon the mistake of a material fact.

MORSE, J., delivered the opinion of the court:

Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out twenty-five assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff. The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon their Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter:

"WALKERVILLE, May 15, 1886.

"T. C. Sherwood, President, etc.—Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot fifty-six of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer. Yours truly,

"HIRAM WALKER & SONS."

The order upon Graham inclosed in the letter read as follows:

"WALKERVILLE, May 15, 1886.

"George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Ply-

mouth, the cow Rose 2d of Aberlone, lot fifty-six of our catalogue. Send halter with cow, and have her weighed. Yours truly,

"HIRAM WALKER & SONS."

On the twenty-first of the same month, the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, $80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost $850, and if not barren would be worth from $750 to $1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the 20th of May, 1886, telegraphed plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following. On the 19th of May, the plaintiff wrote Graham as follows:

"PLYMOUTH, May 19, 1886.

"Mr. George Graham, Greenfield—Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning.

"Yours, etc., T. C. SHERWOOD."

Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants was at his home, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy at $90, and Rose 2d at $80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had, but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order. If they believed that defendants intended to pass the title by writing, it did not matter whether the cow was weighed before or after suit was brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will, therefore, be seen that the defendants claim that, as a matter of law, the title of this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over $50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted part of the goods, or given something in earnest, or in part payment, or where the seller has signed some note or memorandum in writing. How. St. § 6186. Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the pur-

chase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yards, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yards. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff. Payment was not to be a concurrent act with the delivery, and therein the case differs from Case v. Dewey, 55 Mich. 116, 20 N. W. Rep. 817, and 21 N. W. Rep. 911. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by surrender of the possession to the vendee, and an acceptance by him. Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by a jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff. I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence of any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be done before the delivery even, or the passing of title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: Lingham v. Eggleston, 27 Mich. 324; Wilkinson v. Holiday, 33 Mich. 386; Grant v. Merchants' & Manufacturers' Bank, 35 Mich. 527; Carpenter v. Graham, 42 Mich. 194, 3 N. W. Rep. 974; Brewer v. Michigan Salt Ass'n, 47 Mich. 534, 11 N. W. Rep. 390; Whitcomb v. Whitney, 24 Mich. 486; Byles v. Colier, 54 Mich. 1, 19 N. W. Rep. 565; Scotten v. Sutter, 37 Mich. 527, 532; Ducey Lumber Co. v. Lane, 58 Mich. 520, 525, 25 N. W. Rep. 568; Jenkinson v. Monroe, 28 N. W. Rep. 663.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured the possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or

he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, §§ 605, 606; Leake, Cont. 339; Story, Sales, (4th ed.) §§ 377, 148. See, also, Cutts v. Guild, 57 N. Y. 229; Harvey v. Harris, 112 Mass. 32; Gardner v. Lane, 9 Allen, 492, 12 Allen, 44; Huthmacher v. Harris' Adm'rs, 38 Pa. St. 491; Byers v. Chapin, 28 Ohio St. 300; Gibson v. Pelkie, 37 Mich. 380, and cases cited; Allen v. Hammond, 11 Pet. 63-71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold—then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." Kennedy v. Panama, etc. Mail Co., L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for its present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

NOTE.—The decision in this case follows the teachings of "natural law," accords with the rule of the "civil law," and agrees with the later decisions relating to mistakes of material facts.

Mistake—Definition.—In order to have a correct understanding of the equitable doctrine of relief where there has been a mistake made in regard to some material fact, one must have a clear apprehension of the meaning of the word "mistake." Webster defines mistake as follows: "An error, in opinion or judgment; misconception; a slip; a fault; an error." This definition does not exclude the idea of intention, and hence is too narrow. Jeremy defines it to be, "That result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done." Story's definition is: "It is sometimes the result of accident in a large sense; but it is distinguished from it; it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence." Hayne says: "Mistake, as contra-distinguished from accident, is where a person, acting under an erroneous conviction, either of law or fact, executes some instrument, or does some act which, but for the erroneous conviction, he would not have executed or done." [1]

Warranty of Quality—Description.—In sales generally, there is no implied warranty of the quality of the goods sold; [2] but the bargain and sale of a chattel as being of a particular description, implies a contract that the article sold corresponds to the description. And, usually, the vendor and purchaser, each relying on his own skill and knowledge, and each being at liberty to impose conditions or to exact warranties, before giving assent, and each taking upon himself all risks except those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties, deal at arms length.[3] And if they use general words, unascertained and undefined advantages, although not in the contemplation of either party at the time, will pass by the grant. Thus, minerals in the lord's waste, although the existence of them was not known or suspected by any of the parties, would pass; and so, likewise, would an advowson appendant to a manor.[4]

[1] Jeremy's Eq. Jur., book 3, ch. 2, p. 358; Story's Eq. Jur., § 110; Willard's Eq. 59; Hayne on Eq. 132.

[2] 2 Kent's Com. 374; Coke Litt. 102*a*; 2 Bla. Com. 452; Bacon's Abr., action on the case, E; Comyns on Cont. 263.

[3] Benj. on Sales, 327, 527.

[4] Atty-Gen. v. Ewelmu Hospital, 17 Beav. 384; Hicks v

Subsequent Circumstances Cannot Impeach.—An agreement subject to impeachment must be so at its commencement, for nothing subsequent can impeach it, and a failure in a speculation will be no ground for resisting a specific performance.[5] If the contract entered into be valid at the beginning, no matter how unequal it becomes aftewrards from subsequent circumstances, equity will nevertheless carry it into execution. Therefore, where, during the south sea scheme, A agreed with B to pay him 920 per cent. premium for his south sea stock, the court of chancery, although the stock, between the time of entering into the contract and the time of performing it, fell to par, decreed it to be specifically enforced, and that decree was affirmed on appeal to the house of lords.[6]

And if a mine, after the purchase, prove to be full of faults and nature, as the purchaser knew beforehand that it might, has caused an interruption of the vein of coal, this is one of the incidents of mining property, and cannot be a reason for avoiding the contract.[7]

And somewhat similarly, where the vendee, at New Orleans, during the war with Great Britain in 1815, had received at the time he entered into the contract, intelligence of the peace, purchased of the vendor, who was ignorant of the peace, three hogsheads of tobacco, for a price far below its value in a time of peace, it was held that the purchase could not be avoided, notwithstanding the ignorance of the vendor of that material fact.[8]

And so, too, in the absence of any relation of confidence between the buyer and seller, a court of equity will not set aside a sale of lands, at the instance of a grantor, who was not a dealer and speculator in iron land, and who had discovered iron ore upon the lands in question, and had entered and bought them for iron lands, and who, during the negotiations for their sale, mentioned the fact to enhance their price, that there was a very good show of iron upon them, and finally sold them on that basis at a price largely in excess of their value as timber lands, as against defendants who falsely pretended, after they had examined the lands and discovered that they were very valuable iron lands that they wished to buy them for the timber on them to fill a timber contract, and concealed their discoveries of iron with a view of getting them at less than they considered them worth, and finally bought them at a price below their supposed value.[9]

Natural Law—Error.—The writers upon natural law maintain that an error about a thing, or about its quality, upon prospect of which a man is induced to come to any agreement, renders the agreement or bargain void; for in such case, a man is not conceived to have agreed absolutely, but upon the supposal of the presence of such a thing, or such a quality, on which, as on an implied condition, his consent was founded, and therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual.[10]

Equity—Mistake—General Rule.—The general rule is that an act done, or a contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity.[11] The understanding of both parties is the important question, and if the facts in evidence are to such as to raise the legal inference that the understanding of both parties differed materially, there is no consensus and therefore no contract.[12]

And nothing is clearer than the doctrine that a bargain founded in a mutual mistake of the facts constituting the essence of the contract, or founded upon representations of the seller, material to the bargain, will avoid it althongh made by innocent mistake.[13]

And likewise, ignorance of a material fact, at the time of doing an act or making a contract, will, in general, be ground for relief in equity, not only where one of the parties has concealed the facts fraudulently, but also where both parties have been ignorant, and also where the facts, though previously known, have been forgotten.[14]

Relief to Either Party.—Where a contract is made in ignorance of a material fact the contract is voidable at the election of the person so in error,[15] and a court of equity will relieve against a mistake where it is clearly proven, whether it be at the instance of a complainant or defendant.[16]

Materiality—Must Control Conduct.—A mistake as to a matter of fact to warrant relief must be material, and the fact must be such that it directed and controlled the conduct of the party. It must go to the essence of the object in view and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved.[17]

Mistake as to Existence.—Where a contract is made in the belief of the existence of something which is of importance to the transaction, and which does not exist, there is a failure of consideration.[18] Thus, where the consideration of the covenant to pay an annuity was the conveyance to the covenantor of a tract of land on the right bank of the Ohio river, stated to embrace a coal mine, and the sole inducement to the purchase was the supposed existence of the coal mine, and it was finally ascertained that no coal mine was embraced within the bounds of the deed, equity enjoined perpetually a prosecution at law to recover the annuity.[19]

Sallitt, 3 DeG. M. & G. 782; Hicks v. Hastings, 3 K. & J 701; 2 Sugden on Vend. 506.

5 1 Atk. 404; Adams v. Weare, 1 Bro. C. C. 769; Mortimer v. Capper, 1 Bro. C. C. 156.

6 Thompson v. Harcourt, 1 Bro. Par. Ca. 415; 1 Powell on Cont. 144.

7 Ridgeway v. Sneyd, 1 Kay, 636; 1 Sugd. on Vend. 505.

8 Laidlaw v. Organ, 2 Wheat. 178; Pothier de Vente, no. 233; Willard's Eq. 72.

9 Williams v. Spurr, 24 Mich. 335.

10 Puffendorf's Law of Nature, b. 1, ch. 3.

11 Pooley v. Ray, 1 P. Wms. 355; Corking v. Pratt, 4 Ves. 406; Hitchcock v. Giddings, 4 Price, 135; Leonard v. Leonard, 2 Ball & Beatt. 171; Pearson v. Lord, 6 Mass. 81; Garland v. Salem Bank, 9 Mass. 408; Daniell v. Mitchell, 1 Story, 172; 1 Madd. Ch. Pr. 60; 1 Story's Eq. Jur. § 140; Pothier Pand. Lib. 22, tit. 6, § 3, *n.* 4, 5, 6, 7; Ayliffe's Pand. B. 2, tit. 15, p. 116; 1 Domat, B. 1, tit. 18, § 1; Doct. & Stud. Dial. 2, ch. 47; 1 Fonbl. Eq., B. 1, ch. 2, § 7, note 5.

12 1 Austin's Jur. 310.

13 Daniell v. Mitchell, *supra;* Glassell v. Thomas, 3 Leigh (Va.), 113; Hammon v. Allen, 2 Sumn. 387; Buller's Nisi Prius, 131; Malcolm v. Fullerton, 2 T. R. 648; Mariott v. Hampton, 7 T. R. 269.

14 Bingham v. Bingham, 1 Ves. 126; Hore v. Becher, 12 Sim. 465; Calverly v. Williams, 1 Ves. Jr. 210; Allen v. Hammond, 11 Pet. 71; Wemple v. Stewart, 22 Barb. 154.

15 Roberts v. Fisher, 43 N. Y. 159, Leger v. Bonaffe, 2 Barb. 475; 6 N. Y. Leg. Obs. 235.

16 Hendrickson v. Ivins, Saxton, 562; Schettiger v. Hopple, 3 Grant, 54; Dismukes v. Terry, Walker (Miss.), 197.

17 Grymes v. Sanders, 93 U. S. 55; Trigg v. Reed, 5 Humph. 529; Hill v. Bush, 19 Ark. 522; Bigelow on Eq. 176.

18 Geib v. Reynolds (Minn.), 28 N. W. Rep. 923; Muhlenberg v. Henning (Penn.), 9 Atl. Rep. 144; Gebel v. Weiss (N. J.), 8 Atl. Rep. 889.

19 Dale v. Roosevelt, 5 Johns. Ch. 174; s. c., 2 Cow. 129; Willard's Eq. 69.

In another case it was said: "The deed was founded on the assumption that the county seat had been removed to Fort Smith. The result is the same, as if the deed had been expressly conditioned on the existence of the supposed state of facts. The deed is thus nullified in its inception by the non-existence of a material fact, which constituted at once its inducement and the bases of their negotiations. The mistake was such as to exclude real consent, and so the minds of the parties never met."[20]

In an Iowa case, the court said: "It appears, however, very clear from the evidence, that the lease or conveyance was executed, delivered and received under the belief that there was coal underlying the premises, and that it could be mined. The lease was therefore entered into by the parties through an honest material mistake of fact, of vital importance to the validity of the contract. Both parties were dealing in regard to something which they supposed to be in existence, so far as either had any knowledge. There being, therefore, a total failure of consideration arising out of mutual mistake, the plaintiff is not entitled to recover of the defendant."[21]

So, if one person should sell a messuage to another which was, at the time, swept away by a flood or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser upon the ground, that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of the contract.[22]

And so, too, if a person should execute a release to another party, upon the supposition founded in a mistake, that a certain debt or annuity had been discharged, the release would be set aside. The civil law holds the same doctrine.[23]

Mistakes as to Identity.—Where a mistake occurs as to the identity of the subject of the agreement, assent is not given, and the contract is, of course, void; as where a contract was for lime in casks and the casks were found to contain sand and stones. So, also, where counterfeit notes were taken and passed for genuine. If, however, certain particular notes or coins are agreed to be taken, and they prove to be spurious the loss falls on the holder. The party receiving them is understood to take the risk, and there is no mistake as to their identity. And in some cases negligence in the party receiving worthless coins or notes, as if he does not seasonably return them, or if he pay a forged note against himself, will fix the loss on him.[24]

Pothier gives as an instance of error in the identity of the subject of a contract, which will render it void for want of assent—the purchase of candlesticks as silver which are only plated. In the case of Chandelor v. Lopus, however, the contrary was held by all the judges, except one, in the case of a stone bought and sold as a bozoar stone, which proved to be of some other species less valuable. But Parker, C. J., says that "this case would not now be received as law in England, and certainly not in our own country."

In a note to his edition of Pothier, Evans mentions as a case of error in the subject of the contract, that a painting was sold as an original of Poussin, but it appearing afterward to be the work of some other person, it was held that the sale was void, and the purchaser entitled to recover his money. But this, if as it seems to have been, a case in the English courts, is directly impugned by the case of Jendwine v. Slade, and other adjudications. It must not be understood that every mistake is relievable in equity.[25]

Mistakes as to Title.—If both parties to a contract for the sale of land are under a mistake as to the vendor's title, which was supposed to be perfect, but proves to be void, a court of equity will relieve the vendee from the contract.[26]

So, too, a contract entered into under a mutual mistake or misconception of the rights of the parties, amounting to a mistake of law, by which the object of the contract is defeated, may be set aside.[27]

Mistakes as to the Extent.—The same principle applies to cases of purchases, where the parties have been innocently misled, under a mutual mistake as to the extent of the thing sold. Thus, if one party thought that he had *bona fide* purchased a piece of land as parcel of an estate, and the other thought he had not sold it, under a mutual mistake of the bargain, that would furnish a ground to set aside the contract; because, as has been said, it is impossible to say that one shall be forced to give that price, for part only, which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only.[28]

Mistakes as to the Value.—And upon the same principle it has been held, that if a party at the time of entering into an agreement, respecting a claim, be ignorant of its precise value, but stipulates, under an idea and with an intent that what he is to receive shall be equal in value to that to which he has a claim, if the thing to be received turn out to be not adequate in value to the claim, when its value is ascertained, this will furnish a sufficient ground for a court of equity to set aside the agreement.[29]

Mistakes as to Quality.—In a Pennsylvania case, it was held that the contract having been made upon the assumption of the parties that ore of the quality mentioned existed in the land, when it becomes manifest that the parties were mutually mistaken, the contract obligation will cease.[30]

Relief at Law.—There are many in which ignorance of a particular fact will be a ground of relief at law, and where a court of law can give relief there is no need to apply to a court of equity.[31]

Waiver.—A party upon the discovery of the mistake must at once announce his purpose to rescind and ad-

[20] Griffith v. County of Sebastian (Ark.), 3 S. W. Rep. 886. See Wald. Poll. Cont. 405, 412, 441; Bishop Cont. (enlarged ed.) §§ 70, 587, 693, 698; Kerr Fraud & Mistake, 416; Cooper v. Phibbs, L. R. 2 H. L. 149; Ireck v. Fulton, 3 Gratt. 193; Ketchum v. Catlin, 21 Vt. 191.

[21] Fritzler v. Robinson (Iowa), 31 N. W. Rep. 61.

[22] Hitchcock v. Giddings, 4 Price, 135. But see Sugden on Vend. 237, *n;* Stent v. Bailis, 2 P. Wms. 220; 1 Story's Eq. Jur. § 142.

[23] Hone v. Brether, 12 Sim. 465; Grotius de Jure Belli, B. 2, ch. 11, § 7; Pothier de Vente, *n.* 4.

[24] Conner v. Hendeson, 15 Mass. 319; Gardner v. Lane, 9 Allen, 492; Young v. Adams, 6 Mass. 182; Ellis v. Wild, *Ib.* 321; Markle v. Hatfield, 2 Johns. 455; Jones v. Ryde, 5 Taunt. 488; Eagle Bank v. Smith, 5 Conn. 571; Thomas v. Todd, 6 Hill, 340; Pindall v. Northwestern Bank. 7 Leigh, 617; Gurnsy v. Wormersley, 4 El. & Bl. 133; Metcalf on Cont. 31.

[25] Cro. Jac. 5; 13 Mass. 143; 2 Esp. R. 572; Hill v. Gray, 1 Stark. 434; Tucker v. Woods, 12 Johns. 190; Metcalf on Cont. 31.

[26] Hadlock v. Williams, 10 Vt. 507; Tucker v. Searle, 2 Ch. Rep. 91; Turner v. Turner, 2 Ch. Rep. 81; Evans v. Llewellyn, 2 Brown's Ch. 150.

[27] Chaplin v. Laytin, 1 Edw. Ch. 467.

[28] Calverly v. Williams, 1 Ves. Jr. 210.

[29] Cocking v. Pratt, 1 Ves. 400; 2 Pow. on Cont. 123.

[30] Muhlenberg v. Henning (Penn.), 9 Atl. Rep. 144; Harlem v. Lehigh Coal, etc. Co., 35 Pa. St. 287; Kemble Coal & Iron Co. v. Scott, 15 Weekly Notes of Cases, 220.

[31] Doct. & Stun. Dial. 2, ch. 47; 1 Story's Eq. Jur. § 146

here to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake had not occurred.[32]

THOMAS D. HAWLEY.

[32] Boyce v. Watson, 20 Ga. 517; Thomas v. Bartol, 48 N. Y. 193; Grymes v. Sanders, 93 U. S. 55.

WILL—CONTEST—EQUITY—JURISDICTION.

LUTHER V. LUTHER.

Supreme Court of Illinois, September 26, 1887.

Will—Contest—Equity—Jurisdiction. — The jurisdiction conferred on courts of equity by the Illinois statutes, authorizing them to entertain bills in equity to contest the validity of wills, at any time within three years after the probate thereof, is limited by the terms of the statute. Consequently the limitation of the time within which such bills should be filed, applies to bills not filed within the prescribed time by reason of an alleged fraudulent concealment. And this rule applies, although the statute itself excepts from the limitation persons laboring under disabilities, such as infancy, coverture, insanity and absence from the State.

MAGRUDER, J., delivered the opinion of the court:

Christian Luther, Sr., died testate, on September 4, 1875, leaving him surviving a widow—the appellee Charlotte Luther—and three children—the appellant Christian Luther, and the appellees John Luther, and Sophia Luther, since married to William Nieberg. On September 3, 1875, he made a will, leaving his furniture and personal property to his widow, and also giving her a life-estate in all his other property, including lots 4, 5, and 6 of Assessor's subdivision of N. E. quarter, and part of the N. W. quarter, of section 5, township 40 N., range 13 E., etc., in Cook county. He devised these lots to John, to be taken possession of by him after the widow's death. He gave appellant Christian Luther $50, and Sophia $1,000; these sums to be paid after the widow's death, and, if the money should not then be on hand for their payment, they were to be liens on the land until John should pay them. The will was admitted to probate in the county court of Cook county on September 27, 1875, and letters testamentary were then issued to the appellee Wende, as executor.

This bill was filed in the circuit court of Cook county on September 1, 1882, for the purpose of setting aside the will, and the probate thereof, on the grounds that the testator was not of sound mind and memory when he made the will, and that he was induced to make it by the fraud, falsehood, and misrepresentation of said Wende, and of said Charlotte, John, and Sophia. The bill alleges that appellants did not learn of the testator's unsoundness of mind and memory, nor of the fraud and undue influence used in obtaining the will, until March, 1884, and that the cause of action set up in the bill was fraudulently concealed by the defendants therein from the complainants until within three years before filing the bill. The defendants, on November 9, 1885, filed an answer denying all the allegations of the bill, but making no reference to the fact of its being filed after the three years prescribed by the statute. Complainants filed a replication to the answer. The cause came on to be heard. A jury was impaneled to try the issue whether the writing produced was the will of the deceased or not. Two witnesses were sworn and testified for defendants. The circuit judge then, having inquired of the solicitor for complainants, and being informed by him that complainants did not come within the saving clause of the statute as to infants, *femes covert*, persons absent from the State, or *non compos mentis*, dismissed the bill on the ground that, upon the face of it, he had no jurisdiction to try the cause.

It will be noted that the will was admitted to probate on September 27, 1875, and that this bill to contest its validity was not filed until nearly ten years afterwards; to-wit, on September 1, 1885. The main question presented by the record is whether a court of chancery in this State can, under our statute, entertain a bill to set aside the probate of a will when more than three years after such probate have elapsed before the bill is filed. The statute is as follows:

"§ 7. When any will, testament, or codicil shall be exhibited in the county court for probate thereof, as aforesaid, it shall be the duty of the court to receive probate of the same without delay, and to grant letters testamentary thereon to the person or persons entitled; and to do all other needful acts to enable the parties concerned to make settlement of the estate at as early a day as shall be consistent with the rights of the respective persons interested therein: provided, however, that if any person interested shall, within three years after the probate of any such will, testament, or codicil in the county court as aforesaid, appear, and, by his or her bill in chancery, contest the validity of the same, an issue at law shall be made up, whether the writing produced be the will of the testator or testatrix or not; which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proven and recorded as aforesaid, according to the practice in courts of chancery in similar cases; but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, persons absent from the State, or *non compos mentis*, the like period, after the removal of their respective disabilities. And in all such trials by jury as aforesaid, the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence, and to have such weight as the jury shall think it may deserve." § 7 of "An act in regard to wills," approved March 20, 1872 (Rev. Stat. ch. 148).

The act of January 23, 1829, in force July 1, 1829 (Rev. Laws 1829, p. 193, § 5), and the act of 1845 (Rev. Stat. 1845, ch. 109, § 6, p. 537), were the same as the act of 1872, except that in the former the period was five years, instead of three years. § 7 is, in substance, a transcript of the eleventh and fifteenth sections of a statute of Kentucky passed February 24, 1797. Rigg v. Wilton, 13 Ill. 15. The Kentucky statute was taken from the Virginia act of 1785, which was a remodeling of an earlier Virginia act, passed in 1748. Well's Will, 5 Litt. (Ky.) 273; 12 Hen. St. at Large, p. 142; 5 Hen. St. at Large, 454, 455; 1 Litt. Laws Ky. p. 611, § 293, and note. The Virginia statute was construed in Coalter's Ex'r v. Bryan, 1 Gratt. 18, and in Connolly v. Connolly, 32 Gratt. 657. The Kentucky statute was construed in Rogers v. Thomas, 1 B. Mon. 390.

In England, the probate of wills of personal property was exclusively vested in the ecclesiastical. There were two modes of probate—one, *ex parte;* the other, *inter partes.* One was proof of the will "in common form;" the other was proof thereof "in solemn form," or "*per testes.*" When a will was proven "in common form," it was taken before the judge of the proper court of probate, and the executor produced witnesses to prove it to be the will of the deceased, without citing or giving notice to the parties interested. It was admitted to probate in the absence of such parties. When, however, a will was proven "in solemn form," it was done upon petition of the proponent for a hearing, and all such persons as had an interest, such as the widow, heirs, next of kin etc., were notified and cited to be present at the probating of the testament. Interrogatories were propounded to the witnesses by those producing the will, and by the adverse party. The executor of the will proved "in common form" might, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes*—"in solemn form." 1 Williams, Ex'rs (6th Amer. ed.), foot pp. 325, 333, 334; Waters v. Stickney, 12 Allen, 1; Redmond v. Collins, 4 Dev. 430; Etheridge v. Corprew, 3 Jones (N. C.), 14. But in England there was no court for the probate of wills of realty. The validity of the will was decided incidentally, in controversies concerning rights of property claimed under or against it. These controversies were settled in the appropriate jurisdictions. The title of the heir was in its nature legal, and might be asserted in an action of ejectment.

The statute of Virginia, upon which our own and that of Kentucky are based, provided for the probate "in common form," or *ex parte*, of wills of both personalty and realty, and also extended the privilege of acquiring a re-probate "in solemn form" to wills of realty, as well as to those of personalty. Such re-probate was to be asked within seven years, instead of three years, as under the Illinois statute. Those to be cited were the persons interested in sustaining, rather than those interested in setting aside, the will. The contest was to be decided in a court of chancery, through the instrumentality of a jury, rather than in the original court of probate.

The words in § 7 of our act in regard to wills, "When any will," etc., "shall be exhibited in the county court for probate as aforesaid, it shall be the duty of the court to receive probate of the same without delay," refer back to § 2 of that act. Rev. Stat. ch. 148. § 2 provides for the *ex parte* proof of wills on the testimony of the attesting witnesses, which is analogous to the probate in England "in common form." The subsequent proceeding by bill in equity, under § 7, to contest the validity of the will, is analogous to the probate "in solemn form" by the executor, upon being cited in by the next of kin. Both stages of the proceedings, however, differ from the former English probates, in that they extend to the real estate as well as to the personal property. McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. Rep. 652.

Counsel for appellants claim that the provision in § 7 for filing the bill within three years is a mere statute of limitations, and that, inasmuch as appellees did not plead the bar of the statute in their answer, they waived it. This position is based upon the theory that the right to contest the validity of the will was not a new right conferred by the statute, but a right which existed at common law before the statute; and that, therefore, the statute merely limits the time within which such right may be asserted. Outside of the statute, however, no right existed in favor of the heir to go into a court of chancery to contest the validity of the will. He could not go into equity for any other purpose than to remove impediments to a full and fair trial at law. The power to entertain bills of this character is not embraced among the general equity powers of a court of chancery.

In Gaines v. Fuentes, 92 U. S. 10, the Supreme Court of the United States say: "In the case of Broderick's Will, the doctrine is approved, which is established both in England and in this country, that by the general jurisdiction of courts of equity, independent of statutes, a bill will not lie to set aside a will or its probate; and whatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts." Broderick's Will, 21 Wall. 503; Gaines v. Chew, 2 How. 619; Gould v. Gould, 3 Story, 516; Tarver v. Tarver, 9 Pet. 174; Holden v. Meadows, 31 Wis. 284; Archer v. Meadows, 33 Wis. 166; 2 Pom. Eq. § 913.

Since the decisions of Kerrick v. Bransby, 7 Brown, P. C. 437, and Webb v. Claverden, 2 Ark. 424, it has been held in England that equity will not set aside a will for fraud and imposition. The same rule has been generally adopted in the United States. Under the common-law system, the validity of wills of real estate could only be

tested in an action at law; that of wills of personal property was established by the decree of the ecclesiastical court in the proceedings for probate. 2 Pom. 913. Therefore, as the jurisdiction of courts of chancery in this State to entertain bills to set aside the probate of wills is derived exclusively from the statute, such jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. "If any person interested shall, within three years after the probate," etc., "appear, and, by * * * bill in chancery, contest the validity of the" will, "an issue at law shall be made up," etc. If such person does not appear within three years, an issue of law cannot be made up. The appearance within three years is a jurisdictional fact, and is necessary in order to put the machinery of the court in motion so as to test the validity of the will.

The court has no power to entertain the bill after the three years have passed. The reason of this is apparent from the words, "if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants," etc. The original probate of the will, upon the testimony of the subscribing witnesses, is allowed without delay, in order to secure an orderly settlement of the estate, and to prevent the embarrassments and injurious consequences to creditors and others which might result from the delay incident to a contest over the will. But serious consequences may also result from too long a delay to the property rights and titles of parties interested in and holding under the will, and therefore a period should be fixed after which the original probate should be regarded as binding and conclusive.

It is urged, however, that the jurisdiction of the court of chancery in this proceeding is merely that of a court of probate. Its jurisdiction cannot be a mere extension and continuation of the "solemn form" powers of the probate court, so far as the realty is concerned; because at common law the probate court exercised no control, either in common or solemn form, over real estate, but only over personalty. But while the court of chancery is not empowered to give general relief, it may exert its powers to secure the specific relief designed by the statute. Though limited in its functions, it is still a court of equity. The proceeding is commenced by bill, framed as any other bill in equity would be framed, except that it is confined to the relief contemplated by the statute; namely, the determination by a jury, on an issue to be directed and tried, of the validity or invalidity of the will. The court, by decree, settles and directs the issue. Connolly v. Connolly, *supra*.

The decree of the circuit court is affirmed.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ACCOUNT STATED — Reopening — Settlement. —— Where, by consent, an account stated is reopened, and one of the parties accepts the amount then allowed in full payment, he is estopped to claim under the first allowance.—*Horn v. St. Paul, etc. R. Co.*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 593.

2. ADMIRALTY—Practice—Interrogatories. ——In admiralty practice interrogatories should be placed at the end of the libel, but if omitted the libelant may, by leave of the court, attach them to an amended libel.—*The Edwin Baxter*, U. S. D. C. (N. Y.), June 21, 1887; 32 Fed. Rep. 296.

3. APPEAL—Bill of Exceptions.——A bill of exceptions which contains all the pleadings and everything but the exceptions to rulings on evidence and to charges given or refused, cannot be considered as a bill of exceptions for any purpose.—*Efurd v. Loeb*, S. C. Ala., July 13, 1887; 3 South. Rep. 3.

4. APPEAL—Case Docketed—Dismissal.——Where the abstract of the petition shows a different name from that docketed, and it does not appear that the docketed case ever had an existence, the docketed case will be dismissed.—*Lewis v. Minthon*, S. C. Iowa, Oct. 22, 1887; 34 W. Rep. 607.

5. APPEAL — Cross-bill — Time. —— An appeal on a cross-bill must be taken within six months after it is finally disposed of, regardless of the time of the decree on the original bill.—*Carter v. Davidson*, S. C. Iowa, Oct. 21, 1887; 34 N. W. Rep. 603.

6. APPEAL—Decree in Chancery—Fraudulent Conveyance.——An appeal lies from a decree in chancery subjecting assets fraudulently conveyed by an insolvent debtor to the claim of a creditor, which decree is ordered to be filed as a claim against the estate of the debtor, since deceased.—*Coffey v. Norwood*, S. C. Ala., June 30, 1887; 3 South. Rep. 8.

7. APPEAL—Evidence—Rejection.——The rejection of proper evidence is harmless error, when it appears it

could not possibly have affected the result.—*Duncan v. Kohler*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 594.

8. APPEAL — Findings by Court.——Findings by the court as to facts will not be disturbed on appeal if there is sufficient evidence to justify them. An alleged error will not be reviewed on appeal, unless it clearly appears it was brought to the attention of the trial court.—*Beaubien v. Hindman*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 184.

9. APPEAL—Frivolous.——Where the assignments of error are frivolous and there is no merit in the appeal, the case should be affirmed with costs and damages.—*Foran v. Allen*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 548.

10. APPEAL—Motion for New Trial—Irregularity.—— On appeal it is too late to raise the objection for the first time that the motion for a new trial was not signed. —*Coust v. Evans*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 214.

11. APPEAL—New Trial—Bill of Exceptions.——The motion for a new trial must specifically indicate the evidence offered and excluded, and the bill of exceptions must show that the evidence offered was that indicated in the motion.—*Sertel v. Graeter*, S. C. Ind., Oct. 18, 1887; 13 N. E. Rep. 415.

12. APPEAL—Practice.——Rules of practice in Texas Supreme Court stated; when, under those rules, a judgment will be affirmed upon appeal, notwithstanding irregularities.—*Silliman v. Dickson*, S. C. Tex., Oct. 18, 1887; 5 S. W. Rep. 408.

13. APPEAL—Reargument—Evidence.—— On motion for reargument after the judgment has been affirmed, an *ex parte* affidavit of a witness, made after the affirmance, that he was mistaken in his evidence, will not be considered.—*McMeen v. Com.*, S. C. Penn., March 14, 1887; 10 Atl. Rep. 785.

14. APPEAL—Reviewing Demurrer.——If an answer is filed after a demurrer to the petition is overruled, such ruling will be reviewed on appeal after the trial, if the original petition is then used; otherwise the party should stand on the demurrer, and appeal at once to have such ruling passed on.— *Union P. R. Co. v. Estes*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 157.

15. APPEAL—Subsequent Action.—— After the trial judge has signed and certified the case, the case has gone beyond his control, and he can make no further order therein.—*Lewis v. Linscott*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 158.

APPEAL—Weight of Evidence.——On appeal there will be no reversal on account of the weight of evidence when the evidence before the jury was conflicting.—*Radway v. Ellis*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 220.

17. APPEAL—Weight of Evidence.——On appeal a judgment will not be reversed where the evidence is conflicting, especially when there has been two concurring verdicts.—*Georgia R. Co. v. Phillips*, S. C. Ga., April 19, 1887; 3 S. E. Rep. 449.

18. APPEAL—Weight of Evidence.——Where the evidence is nearly balanced the verdict will not be set aside on account of the weight of evidence.—*Driscoll v. Troughton*, S. C. Neb., Oct. 26, 1887; 34 N. W. Rep. 497.

19. ASSAULT—Passenger—Carrier.—— Where a passenger, standing upon the platform of a car, which he was about to enter as a passenger, is knocked off and robbed by one carrying a lantern with letters on it and wearing a cap with a badge on it, there is no evidence on which a carrier can be held responsible on a petition alleging that the act was done by its employees.—*Sachrowitz v. Atchison, etc. Co.*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 242.

20. ASSIGNMENT—For Benefit of Creditors—Releases.—Releases, executed by creditors, where a party has assigned his property for the benefit of creditors, so not to bind them, when the court has declared the assignment to be void, and the dividends received are at most but payments *pro tanto*.—*In re Walker*, S. C. Mich., Oct. 12, 1887; 34 N. W. Rep. 591.

21. ASSIGNMENT—For Creditors—Fraudulent Conveyance—Levy.——Where a debtor makes a fraudulent conveyance prior to an assignment for the benefit of his creditors, his assignee (as the law then stood in Michigan), and not a creditor, is the person to attack such conveyance.—*Kinter v. Pickard*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 535.

22. ASSUMPSIT—Quantum Meruit—Special Contract.—Where plaintiff sues in *assumpsit* for his services on a *quantum meruit*, and defendant answers a special contract, wherein plaintiff's compensation was to depend upon a specified contingent event, the defendant must prove that the event has not happened.—*Evans v. Miller*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 596.

23. ATTACHMENT—Equitable Owner — Notice. —— A purchased certain lands and personal property from B, paying some money and giving his note, due the next day, for the balance, B giving him a written contract to convey the legal title upon payment of the note, all of which was done the next day. On this next day C attached the property as belonging to B prior to the payment. Both A and C were ignorant of the proceedings of the other: *Held*, that A's title would prevail over the attachment.—*Burke v. Johnson*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 204.

24. ATTACHMENT—Measure of Damages. —— Where goods are attached in good faith by the sheriff as the goods of another, and the owner has repurchased them from the purchaser at sheriff's sale, the damages against the sheriff are the money so paid (not more than the market value) and such special damages as he suffered from the taking by way of injury, depreciation or otherwise.—*Dodson v. Cooper*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 200.

25. ATTACHMENT—Petition—Affidavit.—— The signature of the petitioner and the *jurat* of the magistrate annexed to the petition for an attachment are sufficient evidence that the oath was taken by one and administered by the other. The statement of the grounds therefor is not insufficient if it follows the language of the statute.—*Loeb v. Smith*, S. C. Ga., May 9, 1887; 3 S. E. Rep. 458.

26. ATTORNEY—Authority — Estoppel. —— Where an attorney makes stipulations in a case for a party and appears for him at the hearing, having been consulted by the party and believing he was authorized to act, such party is estopped from denying the authority, the plaintiff having prosecuted the suit, relying upon the stipulation.—*Patterson v. Read*, N. J. Ct. Ch., Oct. 21, 1887; 19 Atl. Rep. 807.

27. BILL OF SALE—Conditional.——A provision in a bill of sale that the warranty of title shall not be in force till the purchase price is paid in full, does not alter the bill of sale into a conditional sale.—*Tagg v. Behring*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 782.

28. BILLS AND NOTES—Variance—Parol Evidence. —Parol evidence in a suit on a promissory note that it was given for an interest in a patented machine and was only to be paid out of the profits realized therewith, and that no profits were realized, is inadmissible. —*De Long v. Lee*, S. C. Iowa., Oct. 21, 1887; 34 N. W. Rep. 613.

29. BILLS AND NOTES—Variance—Parol Evidence.—— Where A signs a note simply, he cannot prove by parol evidence that he signed it as B's agent.—*Junge v. Bowman*, S. C. Iowa, Oct. 15, 1887; 34 N. W. Rep. 612.

30. BOND—Appeal—Rent of Premises.——On appeal from a judgment for possession the defendant must pay, on affirmance of the judgment, the costs and the rent of the premises till the plaintiff's judgment was terminated by foreclosure of mortgage.—*Estey, etc. Co. v. Runnels*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 581.

31. BOUNDARIES—Fence Viewers.—— Fence viewers have no authority to establish disputed boundary lines, and their action in so doing is merely an oral submission or parol contract, to which the statute of frauds applies.—*Camp v. Camp*, S. C. Vt., Oct. 21, 1887; 10 Atl. Rep. 748.

32. BOUNDARIES — Mistake — Acquiescence. —— A boundary line, recognized for twenty-five years, is con

clusive upon the parties, although such line is erroneous through mistake of the surveyor. Adverse possession cannot be sustained as conferring title if it is held in ignorance and without the intention of making a claim.—*Blassingame v. Davis*, S. C. Tex., Oct. 14, 1887; 5 S. W. Rep. 402.

33. BURGLARY — Statute. —— Construction of Kentucky statutes relative to burglary and ruling on the sufficiency of an indictment founded thereon.—*Commonwealth v. Wicker*, Ky. Ct. App., Oct. 20, 1887; 5 S. W. Rep. 428.

34. CARRIER—Bill of Lading—Estoppel.——One who advances money upon bills of lading given by a carrier to the owner of goods carried, who permits such owner to withdraw the bills of lading, is estopped from claiming that the title passed to him or requiring the delivery of the goods, they having been previously surrendered upon delivery of the bills of lading by the owner.—*Douglas v. People's Bank*, Ky. Ct. App, Oct. 18, 1887; 5 S. W. Rep. 420.

35. CERTIORARI—Replevin—Appeal.——Where a justice wrongfully dismisses a replevin suit, the plaintiff is entitled to a writ of *certiorari* from the circuit court, though a special appeal to that court is a better remedy. —*Proper v. Conkling*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 560.

36. CONTRACT—Public Policy.——A contract to pay another a bonus should he get the post-office transferred to a building which the latter was about to erect, which transfer he subsequently effected, is valid, in the absence of proof that any improper means were used. —*Beal v. Polhemus*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 532.

37. CONTRACT—Restraint of Trade—Injunction.——A contract in which the sale of intoxicating liquors in less quantities than five gallons is forbidden, is not in restraint of trade. Injunction is the proper remedy to prevent the violation of such contract.—*Sutton v. Head*, Ky. Ct. App., Oct. 13, 1887; 5 S. W. Rep. 410.

38. CONTRACT—Restraint of Trade.——A contract by a seller with a purchaser that he will not directly or indirectly engage in the sale of friction matches for ninety-nine years anywhere in the United Stases, except in Nevada and Montana, excepting in the capacity of agent or employee of the purchaser, is valid.—*Diamond M. Co. v. Roeber*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 419.

39. CONTRACT — Support — Offset. —— Where G was bound to support his mother at a certain place, one who supports her elsewhere after G's death cannot offset such expense against a claim by G's estate against him.—*Dodge v. Benedict*, S. C. Vt., Oct. 19, 1887; 10 Atl. Rep. 750.

40. CORPORATION—Directors — Election — Cumulative Voting.——The law which authorizes stockholders to vote for directors gives to each of them for each share of stock votes for as many directors as are to be elected, but does not authorize cumulative voting. — *State v. Stockley*, S. C. Ohio., Oct. 4, 1887; 13 N. E. Rep. 279.

41. CORPORATION—Transfer of Stocks.——If a corporation has no by-laws about transferring its shares, and keeps only one book with two stubs attached, on which are entered the date, name, etc., a memorandum on the stub that the shares are transferred to a party as collateral, with the date, is a sufficient compliance with the law that they must be transferred on the books to bind *bona fide* creditors and subsequent purchasers.— *Fisher v. Jones*, S. C. Ala., July, 19, 1887; 3 South. Rep. 13.

42. COSTS — Apportionment — Appeal. —— Where a perpetual injunction is granted against a judgment rendered in vacation, on appeal it cannot be said that the trial court erred in apportioning the costs between the parties when the record does not purport to contain all the evidence offered at the hearing.—*Davis v. Cannady*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 225.

43. COUNTIES — Unauthorized Loan. —— When a county treasurer borrows money to pay the taxes due the State, reciting in the note that it was given in pursuance of a resolution of the board of supervisors, which was not true, the county is not liable on the notes.—*First Nat. Bk. v. Saratoga Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 439.

44. COVENANT—Warranty—Estoppel— Eviction.——A defendant in an action for breach of warranty is estopped to say that his prior deed to the said land, by virtue of a judgment in a special proceeding, is not valid and paramount to his deed to the plaintiff. The existence of a better title with actual possession under it is a breach of the covenant of warranty.—*Hodges v. Latham*, S. C. N. Car., Oct. 18, 1887; 3 S. E. Rep. 495.

45. CREDITOR'S BILL—Joinder—Insolvency.——Creditors on separate judgments may join in a creditor's bill, and where a return of *nulla bona* on the execution in one case has been made and in the other no execution has been issued, but it is alleged that they know of no property on which a levy can be made, the bill can be sustained as to the second judgment.—*Enright v. Grant*, S. C. Utah, Oct. 17, 1887; 15 Pac. Rep. 268.

45. CRIMINAL LAW—Appeal—Larceny—Two Statutes.—Where the defendant claims he was tried under the larceny act, and should have been tried under the pick-pocket act, on appeal the judgment will be affirmed where the record does not show the evidence or the instructions.—*State v. Dorsey*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 240.

46. CRIMINAL LAW—False Pretenses.——In a prosecution for obtaining money under false pretenses, the false pretenses must be established, and it must be shown that the party who parted with the money relied on them.—*State v. Metsch*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 251.

47. CRIMINAL LAW——Indictment—Sale of Cotton.—An indictment for selling cotton within the prohibited hours must also allege that it was brought or carried in some mode designated in the statute.—*State v. Whittaker*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 488.

49. CRIMINAL LAW—Malicious Mischief—Tender.—— A tender to the owner of full compensation for the animal killed or injured, and his refusal thereof before the commencement of the prosecution is a bar to it, unless prior thereto the owner notifies the defendant of his readiness to receive compensation, which the accused fails to make.—*Roe v. State*, S. C. Ala., July 27, 1887; 3 South. Rep. 2.

50. CRIMINAL PRACTICE—Challenging Jurors.——After the defendant has exhausted his peremptory challenges he cannot withdraw a challenge and have a rejected juror accepted instead of a talesman, who has been called to complete the jury.—*Biddle v. State*, Md. Ct. App., June 21, 1887; 10 Atl. Rep. 794.

51. CRIMINAL PRACTICE—Juror—Opinion.——A juror who says he has not formed or expressed such an opinion as will prevent him from rendering a true verdict on the evidence is competent.—*State v. Smith*, S. C. Iowa, Oct. 20, 1887; 34 N. W. Rep. 597.

52. CRIMINAL PRACTICE—Larceny—Value of Property. ——If the jury in a case of larceny entertain a reasonable doubt whether the value of the property stolen exceeds $20, they can only convict of the lower degree. —*State v. McCarty*, S. C. Iowa, Oct. 21, 1887; 34 N. W. Rep. 606.

53. CRIMINAL PRACTICE—Oath—Warrant.——It is sufficient if the oath is made by the private prosecutor before any officer authorized to issue oaths before the warrant is issued, and the certificate may be added afterwards to the complaint if it has been omitted.— *State v. Freeman*, S. C. Vt., Oct. 19, 1887; 10 Atl. Rep. 752.

54. DEED — Life Estate — Remainder. —— Where a grantor conveys by deed land to two persons, to be equally divided between them and their heirs, to be held by them, and at their death to go to their children respectively: *Held*, that such a deed conveyed a life estate to each of the grantees, and a deed of her interest made by one of them was inoperative to pass the title

as against her children.—*Owings v. Hill*, Ky. Ct. App., Oct. 18, 1887; 5 S. W. Rep. 418.

55. DEED—Description — Property Conveyed. —— A deed to land known as lot 3, in the original township of Lysander, lying southerly or southeasterly of Fish Lake, supposed to contain sixty-seven acres, carries only the sixty-seven acres, though lot 3 contained seven acres north of the lake sixty-seven acres south of it, and 526 acres covered by the lake.—*Case v. Dexter*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 449.

56. DEED—Mental Capacity.—— Facts stated which show, though the evidence was conflicting, that a grantor in a deed had sufficient mental capacity to make it, such deed being consistent with the circumstances of the family and eminently proper.—*Adair v. Cook*, Ky. Ct. App., Oct. 13, 1887; 5 S. W. Rep. 412.

57. DEED—Register—Rankruptcy.—— A deed of assignment to the assignee in bankruptcy by the register in bankruptcy requires no acknowledgment.—*Harris v. Pratt*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 216.

58. DEED — Trust — Foreclosure — Limitations. —— Where land charged by the same deed of trust for three several purchase money notes, is sold under foreclosure for one note, it remains subject to a lien for the payment of the other two notes. Ruling upon the statutes of limitations in reference to promissory notes.—*Shields v. Dyer*, S. C. Tenn., Oct. 5, 1887; 5 S. W. Rep. 439.

59. DEED OF TRUST—Mines—Foreclosure.——A deed of trust of mining property to secure money advanced to be paid out of the rents, issues and profits of the mine, permits an action to subject the mine to the lien therefor, when such rents, issues and profits are insufficient.—*Charter, etc. Co. v. Stephens*, S. C. Utah, Oct. 17, 1887; 15 Pac. Rep. 253.

60. DIVORCE—Wife's Property.——Where a divorce is awarded to a wife, it is proper to give her all her money which he has in his hands.—*Pauly v. Pauly*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 512.

61. DURESS—Payments—Recovery.——When a party pays more than he owes as a bonus, he cannot recover it. If he pays it under threats of the defendant to seize and sell plaintiff's vessel under a mortgage, which defendant holds, he can recover it.—*Dykes v. Wyman*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 561.

62. EASEMENTS—Drainage—Condemnation. — Where land is condemned for a railroad everything incident to, and necessary for, the subsequent operation of the road passes, and the railroad is not liable because its drainage fills up the ditch, which drains the land, and thereby the ditch is unable to also carry off the drainage water from the plaintiffs' land, he draining his water into that ditch but having no easement therein.—*Willey v. Norfolk, etc. R. Co.*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 465.

63. ELECTIONS — Registration. —— A law which required one to be registered on one of certain days prior to the election, in order to vote, is unconstitutional.—*State v. Conner*, S. C. Neb., Oct. 26, 1887; 34 N. W. Rep. 499.

64. EQUITY — Reformation of Deed —Mistake.——To effect the reformation of a deed for mistake, the evidence must be clear and explicit. One who claims such reformation must show his ignorance of the facts and due diligence in endeavoring to ascertain them.—*Fitzpatrick v. Ringo*, Ky. Ct. App., Oct. 22, 1887; 5 S. W. Rep. 431.

65. ESTATE—Survivorship.——A deed by husband to wife, her heirs and assigns forever, with right of survivorship in himself, vests the title to such estate in the survivor of the parties.—*McKee v. Marshall*, Ky. Ct. App., Oct. 15, 1887; 5 S. W. Rep. 415.

66. EVIDENCE — Admissibility — Issues. —— Evidence not pertinent to the issues made cannot be considered, though it would have been pertinent if the issue had been made.—*Payette v. Day*, S. C. Minn., Oct. 28, 1887; 34 N. W. Rep. 592.

67. EVIDENCE — Assumpsit — Price.——When a parol contract fixes the price for the work done, evidence that others would have done the work cheaper is immaterial.—*Seibert v. Householder*, S. C. Pa., Oct. 3, 1887; 10 Atl. Rep. 784.

68. EVIDENCE—Expert Testimony.——It is not competent to allow a witness to express in answer to a question his opinion upon a mixed question of law and fact. To make the testimony of a witness competent as that of an expert it is necessary to show affirmatively that he has the qualifications of an expert.—*Half v. Curtis*, S. C. Tex., Oct. 18, 1887; 5 S. W. Rep. 451.

69. EVIDENCE — Gift — Deceased. ——A statement of deceased, made to a third party, that he had made a gift to another and had delivered the property to him, is competent evidence to prove that fact.—*Pritchard v. Pritchard*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 506.

70. EVIDENCE — Written Contract — Ambiguity. —— Where the words used in a written contract are not technical, no witness can give his opinion on the instrument. He who wrote the instrument must explain the ambiguity, if he seeks an interpretation favorable to him, otherwise judgment must go against him.—*Hill v. King, etc. Co.*, S. C. Ga, March 29, 1887; 3 S. E. Rep. 445.

71. EXEMPTION — Realty — Action to Assert.——The grantor and grantee of land, which the former was entitled to claim as exempt, may file an action to establish such exemption against creditors of the former, who have filed transcripts of their judgments from justices in the clerk's office before the conveyance was made.—*Barnard v. Brown*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 401.

72. EXEMPTION—Statute. —— The exemption law of Kentucky which provides a year's support for the family is not retroactive in its operation.—*Millay v. White*, Ky. Ct. App., Oct. 15, 1887; 5 S. W. Rep. 429.

73. EXECUTORS — Commissions — Realty — Advancements.——Where an executor declares the real estate of the decedent is not required to be sold to carry out the provisions of the will, and the devisees divide it by conveyances between themselves, and by the will the advancements to certain children were fixed at a certain sum for the purpose of determining the shares due them, but not to be collected, the executor is entitled to no commissions on the real estate or the advancements.—*Metcalfe v. Coles*, N. J. Prerog. Ct., Oct. 18, 1887; 10 Atl. Rep. 804.

74. EXECUTION — Justice's Judgment — Levy. ——An execution on a justice's judgment is not void because it is issued by another justice, nor because it was addressed to, and levied by, the sheriff of the county.—*Sandlin v. Anderson*, S. C. Ala., June 2, 1887; 3 South. Rep. 28.

75. EXECUTION—Sale—Statutes.——A purchaser upon an execution sale of lands may, after the time for redemption has expired, move for judgment giving him possession, and if upon such motion it appears that the execution defendant had no title to the property sold, the purchaser may have the sale set aside and the return of the officer quashed. Construction of Kentucky statutes on the subject.—*Bent v. Maupin*, Ky. Ct. App., Oct. 20, 1887; 5 S. W. Rep. 425.

76. EXECUTION—Supplementary Proceedings.——The sufficiency of the order and of the affidavit in supplementary proceedings can only be tested by demurrer, or motion to dismiss or strike out, and the affidavit or verified complaint may be amended as in ordinary cases.—*Hutchinson v. Trauerman*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 412.

77. FRAUD—Deed— Rescission.——Where, by fraudulent means, one is induced to buy land for a price far beyond its value, upon returning the money and other consideration received he can have the contract rescinded.—*Scadin v. Sherwood*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 553.

78. FRAUD—Voluntary Payment.——Where a woman pays a note made by her husband and herself out of insurance money received on her husband's death, as was proposed by herself and husband, and afterwards prevents a claim therefor against his estate, she cannot claim fraud on the part of the payee in inducing her to

pay this money.—*Tompkin v. Hollister*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 551.

79. FRAUDULENT CONVEYANCES—Alimony—Tort.——S having confessed to a crime, which, if prosecuted would send him to the penitentiary and entitle his wife to a divorce, conveyed his personal property to a trustee, to her use while his wife and to the use of others if she obtained a divorce. *Held*, the conveyance was void against her decree for alimony in a divorce suit, but valid against a judgment subsequently acquired against him for tort.—*Green v. Seaver*, S. C. Vt., Oct. 17, 1887; 10 Atl. Rep. 742.

80. GUARANTY—Mortgage Sale—Deficiency.——Where defendant guaranteed a note secured by a mortgage as one contract, and agreed to pay deficiency on mortgage sale, the defendant was liable for the deficiency from the mortgage sale without exhausting the remedies on the note.—*Briggs v. Norris*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 582.

81. GUARDIAN—Bond—Surety.——Upon the death of the ward the liability of a surety on the guardian's bond accrues, and it becomes an accrued claim under Alabama laws on his failure to settle his accounts, and this claim must be presented against the estate of the surety within eighteen months after the grant of letters of administration on his estate, and the statute will run, though no letters of administration are taken out on the estate of the ward.—*Glass v. Woolf*, S. C. Ala., July 13, 1887; 3 South. Rep. 11.

82. GUARDIAN — Settlement — Validity. —— A settlement by a guardian by notice by publication to the non-resident ward, no guardian *ad litem* being appointed, may be disregarded at the ward's election, and a statement in the decree that he was of full age is no bar to a proceeding to settle the guardianship.—*Turrentine v. Daly*, S. C. Ala., July 19, 1887; 3 South Rep. 16.

83. GUARDIAN AND WARD—Equity — Jurisdiction—Removal.——In Tennessee, a court of equity has exclusive jurisdiction of an application of a foreign guardian to the property of his insane ward out of the State.—*Taylor v. Nichols*, S. C. Tenn., Oct. 4, 1887; 5 S. W. Rep. 436.

84. HIGHWAYS — Damages — Appeal. —— On appeal from an award of damages for laying out a highway, the only question is the amount of damages, and it is no defense to such action that a public road has previously been laid out and established over the same right of way.—*Walaunsee County v. Bisby*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 241.

85. HIGHWAYS — Petitioners—Withdrawal of Names. ——The names of land-owners to be assessed in the construction of a free gravel road may be added to, or withdrawn from, the petition at any time before the county commissioners proceed to act on the report by leave of the board, and such a request made in due season may be considered as pending on appeal or may be made *de novo*.—*Black v. Thompson*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 409.

86. HOMESTEAD — Abandonment. ——The presumption of a homestead by seven years' absence is overcome, when the homesteaders retained part of the premises and kept there a part of their household-goods, and intended to return and occupy the place as a homestead.—*Repenn v. Davis*, S. C. Iowa, Oct. 12, 1887; 34 N. W. Rep. 326.

87. HOMESTEAD — Exemption — Conversion — Investment.——Where a party has converted property exempt under the homestead law by causing it to be sold and bidding it in himself, and judgment has gone against him therefor, he cannot ask that the money so arising shall be invested and only the income paid over to the claimants, though the property will revert to himself upon the termination of the exemption.—*Harrell v. Harrell*, S. C. Ga., Feb. 26, 1887; 3 S. E. Rep. 457.

88. HOMESTEAD — Mortgage—Foreclosure.——Where a creditor holding conveyances of a homestead conveys it to the wife, taking a mortgage from her to secure an earlier debt of the husband, she, while he does not offer to return the deed to her, cannot object to his foreclosue of the mortgage, and the children are not affected thereby.—*Mims v. Wight*, S. C. Ga., Feb. 8, 1887; 3 S. E. Rep. 447.

89. HUSBAND AND WIFE—Charging Her Estate—Note. ——A note of a married woman presumptively only charges her estate to the extent of her then interest, but when she holds a warrantee deed in fee simple, though in reality another owns the fee, which comes to her subsequent to the execution of the note, her fee simple is bound by the note.—*Parker v. Marks*, S. C. Ala., July 20, 1887; 3 South. Rep. 5.

90. HUSBAND AND WIFE—Her Property—Mortgage.—— Where a mortgagee, in an action of statutory detinue, bases his right of recovery on his title, the husband, though he recited in the mortgage, which he alone executed, that the property was his, may show that the property was his wife's statutory estate, was in her possession, and he had no right to mortgage it.—*McIntosh v. Parker*, S. C. Ala., July 20, 1887; 3 South. Rep. 19.

91. HUSBAND AND WIFE—Notice—His Liability.—— Where a husband has notified a tradesman orally and in writing not to trust his wife, he is not bound for goods afterwards supplied, because he leaves them where the tradesman has placed them in his house, and neither returns them nor notifies him to take them away.—*Segelbaum v. Ensminger*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 759.

92. HUSBAND AND WIFE — Separate Property — His Declarations.——Where a wife's right to the property in suit is denied from her husband by contract with him, and such contract is contested as fraudulent, any of his acts or declarations tending to show its fraudulent nature, brought to the knowledge of the wife, are admissible.—*Wright v. Towle*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 579.

93. INFANT — Deed —Confirmation.——An infant remainderman, who joins with the life tenant in a deed thereof, will be held to have affirmed it, unless within a reasonable time after he comes of age he avoids it, even though the life tenant is alive.—*Ihley v. Padgett*, S. C. S. Car., Oct. 6, 1887; 3 S. E. Rep. 468.

94. INFANTS — Disaffirmance —Improvements.——On his disaffirmance of his contract of sale by an infant the grantees are entitled to the cost of improvements made by themselves and their intermediate grantors.—*Rundle v. Spencer*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 548.

95. INSOLVENCY—Statute—Construction.——The term insolvency, as used in the statutes of Connecticut, is defined to be technical insolvency. The mere contracting a debt without the means of paying it is not necessarily insolvency according to the statute. Further rulings on the subject of insolvency.—*Hayden v. Allyn, etc. Co.*, S. C. Err. & App. Conn., September, 1887; 5 N. Eng. Rep. 37.

96. INSURANCE — Insolvency— Jurisdiction.——When an insurance company becomes insolvent the proper forum for annulling its charter and winding up its affairs is in the State of its creation. Policy holders cannot enforce their rights in States in which it does business by permission, but are remitted to the courts of its domicil.—*Weingartner, v. Charter Oak, etc. Co.*, U. S. C. C (Mo.), Oct. 8, 1887; 32 Fed. Rep. 314.

97. INSURANCE—Royalties—Wagering Policy.——The royalties on a patent-right are susceptible of being the subject of fire insurance, provided the premises insured against fire are so used in the production of the royalty that their destruction by fire would cause a diminution in the amount of such royalty; otherwise the policy would be a wagering policy.—*National, etc. Co. v. Citizen's, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 337.

98. INTOXICATING LIQUORS — Bond — Suit.——A suit may be brought in the name of the State by any citizen of the county on a liquor dealer's bond for failure to make the reports required.—*State v. De Kruif*, S. C. Iowa, Oct. 8, 1887; 34 N. W. Rep. 607.

99. INTOXICATING LIQUORS—Evidence—Criminal Practice.——Upon an indictment for selling intoxicating liquors to a minor the defendant must show that in good faith he believed his customer to be of age, and the assurances of the minor are not sufficient to justify him. Ruling upon criminal practice and continuance.—*Behler v. State*, S. C. Ind., Oct 14, 1887; 13 N. E. Rep. 272.

100. JUDGMENTS—Amendments Nunc Pro Tunc.——A judgment of the probate court against an executor for a gross sum in favor of the guardian of four minor heirs cannot be amended at a subsequent term without notice to the executor to make a separate judgment in favor of each heir for a fourth of the sum.—*Browder v. Faulkner*, S. C. Ala., July 12, 1887; 3 South. Rep. 30.

101. JUDGMENT — Deed — Variance. —— Where the record of the judgment states that the execution was issued in November, 1869, on a judgment in favor of Seth Newell, guardian, and the sheriff's deed states that the sale took place in September, 1869, under an execution in favor of Seth Newell, the variance is not fatal.—*Wilson v. Taylor*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 492.

102. JUDGMENT—Effect—Res Adjudicata.——In a suit brought by plaintiffs the defendant pleaded the breach of covenant of the sea-worthiness of the vessel. This point had been litigated and decided against the defendant in a previous action. *Held*, that the matter was *res adjudicata* and the defense untenable.—*Woodhouse v. Duncan*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 334.

103. JUDGMENT—Error—Reversal.——A judgment will not be reversed for an error that does no harm to the parties seeking the reversal.—*Bean v. Conway Sav. Bank*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 84.

104. JUDICIAL SALES—Execution—Fraudulent Conveyance.——The law favors judicial sales and will construe liberally proceedings which result in them. A levy of an execution, in which the date was not stated, is presumed to have been made on the day when the execution came to the officer's hands, if that day appears on the execution. An execution creditor may levy his execution on lands fraudulently conveyed disregarding the conveyance.—*Scott v. Scott*, Ky. Ct. App., Oct. 20, 1887; 5 S. W. Rep. 423.

105. JUSTICE OF THE PEACE—Jurisdiction—Railroads. ——A suit against a railroad for killing stock in one township was brought in another township which adjoined a township through which the railroad ran: *Held*, that the justice had jurisdiction.—*Jebb v. Chicago, etc. R. Co.*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 538.

106. JUSTICES OF THE PEACE—Replevin—Impounded Beasts.——A justice of the peace has jurisdiction of an action of replevin for beasts impounded for unlawfully running at large and trespassing upon the premises of the distrainor.—*Pistorious v. Swarthout*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 547.

107. LANDLORD AND TENANT — Lease—Fixtures.—— When a tenant accepts a new lease without any agreement as to the trade-fixtures owned by him, he does not waive his right to them, unless the lease in clear terms covers the fixtures.—*Second Nat. Bank v. Merrill Co.*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 514.

108. LANDLORD AND TENANT—Repairs.——Where the upper floor is leased to a tenant, and by some means the water-closet, over which the owner has no control and which he is not bound to repair, overflows and injures the tenant below, the landlord is not liable.—*Kenny v. Barns*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 587.

109. LANDLORD AND TENANT — Title — Estoppel.—— Where a school district takes a lease of ground already in its possession on a threat of such party to assert his title and evict it, the school district is estopped to deny such party's title in an action for rent.—*School District v. Long*, S. C. Penn., Oct. 3, 1887; 10 Atl. Rep. 771.

110. LOTTERY — Information.——An information in the words stated in the opinion is *held* to sufficiently charge the crime of selling lottery tickets as prohibited by the statutes of the State.—*Trout v. State*, S. C. Ind., Sept. 20, 1887; 12 N. E. Rep. 1005.

111. LIEN—Vendor—Real and Personal Property.—— When a note is taken for the purchase price of real and personal property, there is no vendor's lien on the land, and parol evidence may establish that the price of personal property is included therein, though the note states that it is for the real property.—*Wilkinson v. Palmer*, S. C. Ala., July 29, 1887; 3 South. Rep. 4.

112. MANDAMUS—Jurisdiction.——A circuit court has no right to issue a *mandamus* to compel a postmaster to transmit through the mails publications as second, and not as third-class matter.—*United States v. Pearson*, U. S. C. C. (N. Y.), June 29, 1887; 32 Fed. Rep. 309.

113. MASTER AND SERVANT — Defective Appliances— Jury.——Where a servant was killed by a knife flying out of a rapidly revolving shaper head, which was a new invention of the master, and this was the first time it was used, it was a question for the jury whether the design was bad and whether it was a proper instrument to use.—*Marshall v. Widdicomb F. Co.*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 541.

114. MASTER AND SERVANT — Defective Appliances — Reasonable Time.——A delay of three or four days in remedying defective appliances will not render a master liable for injuries to a servant caused by such defects. The delay is not unreasonable.—*McDowell v. Chesapeake, etc. Co.*, Ky. Ct. App., Oct. 15, 1887; 5 S. W. Rep. 413.

115. MASTER AND SERVANT — Negligence — Convict — Duress ——Where a convict, working in a coal mine, is injured by the negligence of his master, and is charged with contributory negligence in not reporting the state of affairs, he is entitled, in an action for damages, to an instruction by the court on the hypothesis that he was deterred from reporting by duress and fear of punishment.—*Knoxville, etc. Co. v. Smith*, S. C. Tenn., Oct. 8, 1887; 5 S. W. Rep. 438.

116. MASTER AND SERVANT—Superintendent— Patient. ——A superintendent of a hospital does not maintain the position of master relative to an inmate thereof.—*Schnebbe v. Connell*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 503.

118. MORTGAGE—Assignment—Prior Debt.——An assignee of a mortgage as collateral security for a prior debt of the mortgagee is not a *bona fide* holder.—*Waterbury v. Andrews*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 575.

119. MORTGAGE— Crops — Priority. —— Advances by the mortgagee of a crop to the mortgagor to gather and secure it will not have priority over a second mortgage to the wife of the mortgagor to secure advances made by her.—*Weathersbee v. Farrar*, S. C. N. Car., Oct. 10, 1887; 3 S. E. Rep. 482.

120. MORTGAGE — Fraud. —— A personal mortgage, made to secure a liability incurred by the mortgagee for the mortgagor, is void as to the creditors of the former if the terms of the liability is not truly stated in the mortgage.—*Phillips v. Johnson*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 85.

121. MORTGAGE — Foreclosure — Insolvency. —— A mortgagee may buy the land mortgaged, and such purchase has the same effect as a sale under foreclosure. The mortgagee is not estopped by such purchase from enforcing his claims under mortgage on other lands.—*Clark v. Jackson*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 79.

122. MORTGAGE— Foreclosure—Examination. — Where the defendant, in an action of foreclosure brought by an administrator, has no opportunity to examine the administrator, who knows nothing about it, but has an opportunity to examine all other parties, there is no ground for complaint.—*Low v. Hill*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 588.

123. MORTGAGE—Foreclosure—Receiver—Action.—— A receiver appointed in a foreclosure suit, and authorized generally to sue, cannot, however, maintain an ac-

tion in which is involved the title of the mortgagor to property claimed and held adversely by another, the mortgagor not being a party to the action and no assignment of the title to the receiver being shown.—*Harland v. Bankers', etc. Co.*, U. S. C. C. (N. Y.), Sept. 23, 1887; 32 Fed. Rep. 305.

124. MORTGAGE—Married Woman—Patent-right.——The note of a married woman, secured by a mortgage of her homestead, for the price of a patent-right sold to her husband, is void. The patent-right being worthless, and so known to the vendor at the time, the mortgage should be canceled.—*Waterbury v. Andrews*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 575.

125. MUNICIPAL CORPORATIONS—Insurance—Taxation—Statutes.——Construction of Kentucky statutes which authorize the taxation of insurance companies by municipal corporations. What classes of property of such companies are liable to be so taxed.—*Kenton, etc. Co. v. City of Covington*, Ky. Ct. App., Oct. 27, 1887; 5 S. W. Rep. 461.

126. MUNICIPAL CORPORATIONS — Practice — Notice — Statute.——Where one injured by a defective highway, lives more than ten days after the occurrence, and might in that time have given notice of suit to the town, and notice within thirty days after his death, given by his executor, is insufficient.—*Nash v. Town of South Hadley*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 376.

127. MUNICIPAL CORPORATIONS—Streets—Fee—License to Railroads.——In the absence of a contrary statute, a deed of a lot on a street carries the fee to the center of the street. Railroads can occupy public roads, but not streets, under § 1842 of the statutes. A railroad cannot erect an embankment along its condemned right of way, which has been left as a public street in a subsequent platting of a town there, to the injury of an abutting owner.—*Columbus, etc. Co. v. Witherow*, S. C. Ala., July 29, 1887; 3 South. Rep. 23.

128. NEGLECTED CHILD—Commitment.—— A charge that a child fourteen years old was found improperly exposed and neglected, and wandering in a public park without any proper guardianship, does not bring the case within the Penal Code N. Y. § 291, subd. 2; but a charge that said child was found in the company of Mary Ryan, who is a reputed prostitute, is sufficient for a commitment, under Penal Code N. Y. § 291, subd. 4.—*People v. New York, etc. Protectory*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 435.

129. NEGLIGENCE—Contributory— Defective Streets.—In an action for injuries caused by an alleged defective highway, the plaintiff was not guilty of contributory negligence, as a matter of law, because he was driving a blind horse on a dark night.—*Brackenridge v. Fitchburg*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 457.

130. NEGLIGENCE—Contributory — Railroad.——Where plaintiff, in an action to recover damages for injuries received in alighting from defendant's train, alleged that she jumped therefrom, but was guilty of no negligence, she must prove that in so jumping she was an employee or officer of the law in discharge of her duty, or had the consent of the person in charge, under Iowa laws, and such facts are for the determination of the jury.—*Raben v. Central, etc. R. Co.*, S. C. Iowa, Oct. 24, 1887; 34 N. W. Rep. 621.

131. NEGLIGENCE—Contributory—Railroad Crossing.—Where deceased was killed by cars running by their own momentum at a crossing where the railroad had six tracks, the deceased observing the third and fourth tracks, these cars running on the first, the deceased being well acquainted with the custom to run cars in this manner, he is guilty of contributory negligence.—*Woodard v. New York, etc. R. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 424.

132. NEGLIGENCE — Dangerous Premises.—— There being no evidence that a block between tracks was improperly placed there, nor so placed as to be dangerous to the employees of the defendant railroad, the question of negligence relative to an injury suffered by an employee there should not be submitted to the jury.—*Griffith v. Burlington, etc. R. Co.*, S. C. Iowa, Oct. 15, 1887; 34 N. W. Rep. 609.

133. NEGLIGENCE—Dangerous Premises- Landlord.—In a suit for injuries sustained by falling down an elevator well, against the owner, it appeared that the door thereto was kept locked, and the only key known to the owner was then in its place with his agent, but another key had been obtained by a tenant and was used without the owner's knowledge, and the accident was caused by this tenant's carelessness in leaving the door unlocked: *Held*, that the owner was not liable.—*Handyside v. Powers*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 462.

134. NEGLIGENCE—Dangerous Premises—Landlord.—Where the tenant is injured by the fall of the floor of the barn, which the landlord had promised to repair, but which he had not done in a reasonable time thereafter, the landlord is not liable.—*Tuttle v. Gilbert M. Co.*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 465.

135. NEGLIGENCE—Defective Premises.—— A party coming on another's premises must depart therefrom by the usual and ordinary way, and if for his own purposes he leaves such way and is injured at a place not substantially adjacent to the way, the owner is not responsible.—*Armstrong v. Medbury*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 566.

136. NEGLIGENCE—Infants —Contributory Negligence.——Whether it is contributory negligence in the parents of a child to send it out on the street in charge of an elder brother is a question of fact for the jury, dependent upon all the circumstances of the case.—*Bliss v. Town of South Hadley*, S. J. C. Mass., Oct. 19, 1887, 13 N. E. Rep. 352.

137. NEGLIGENCE—Master and Servant—Contributory Negligence.—— A foreman of a mine, with entire supervision, and a power to employ and discharge laborers, is not a coemployee with a laborer. If a laborer continues to work at a dangerous place after the superintendent's promise to make repairs, the question of contributory negligence on his part is for the jury.—*Reddon v. Union Pac. R. Co.*, S. C. Utah, Oct. 1, 1887; 15 Pac. Rep. 262.

138. NEGLIGENCE—Nonsuit — Evidence. —— Circumstances stated, showing such negligence on the part of of defendant railroad company as authorized the court to refuse to order a nonsuit. The general statutes of a State in which a railroad company has its domicile are admissible in evidence in a cause wherein such company is defendant.—*Archer v. New York, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 318.

139. NEGOTIABLE INSTRUMENT—Consideration.——The surrender of a son's note to a father, who is the heir and administrator of his son, is a sufficient consideration for the note of the father for the same amount and payable to the same payee.—*Whitney v. Clary*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 393.

140. NEW TRIAL—Exceptions—Statute.——Under the statute law of Kentucky, the grounds of an application for a new trial must be distinctly stated; it is not sufficient to follow the words of the statute.—*Ohio, etc. Co. v. Kuhn*, Ky. Ct. App., Oct. 18, 1887; 5 S. W. Rep. 419.

141. NUISANCE—Indictment—Statute. —— An indictment which charges the defendant with permitting the carcasses of dead animals and other filth to remain on his premises to the annoyance of his neighbors, describes the offense of committing a public nuisance, within the meaning of the statute of Illinois on that subject.—*Seacord v. People*, S. C. Ill. Sept. 26, 1887; 13 N. E. Rep. 194.

142. NUISANCE—Intoxicating Liquors—Practice.——A complain, charging as a common nuisance the keeping of a tenement for the illegal sale of intoxicating liquors, is sufficient, without expressly negativing an authority to keep and sell the same. Practice under Massachusetts law respecting intoxicating liquors.—*Com. v. Brusie*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 378.

143. OFFICERS — Beginning of Term—Estoppel. —— Where the term of office begins from the first Monday

in November succeeding the election, and the time of the election is subsequently changed to November, an incumbent who, after a November election, assumed office on the next Monday, is estopped to claim against his successor that the term did not begin at that time.—*Boyles v. State*, S. C. Ind., Oct. 18, 1887; 13 N. E. Rep. 415.

144. OFFICE—County Commissioners—Term.—— The term of county commissioners expires with the expiration of each period of three years, regardless of the time when the officer commences service in the term.—*Jones v. State*, S. C. Ind., Oct. 20, 1887; 13 N. E. Rep. 416.

145. OFFICERS— Governor — State Prison — Privileged Communications.——Commissioners appointed by the governor to inspect or take charge of State prisons are not technically officers, although their reports are privileged communications.—*Re State Prison Commission*, S. C. R. I., Oct. 5, 1887; 5 N. Eng. Rep. 99.

146. OFFICERS—Surveyor—Statute. —— Construction of the statute of the State of Indiana relating to the office of county surveyor, the term of office and other matters connected with that position.—*Pursel v. State*, S. C. Ind., Sept. 20, 1887; 12 N. E. Rep. 1003.

147. PARTNERSHIP—Authority of Partner—Assignment. ——One partner cannot assign all the property for the benefit of their creditors without consulting the latter or against his objection, when he is present or can be consulted.—*Adams v. Thornton*, S. C. Ala., July 20, 1887; 3 South. Rep. 20.

148. PARTNERSHIP—Corporation—Liability.——Where goods were sold to a partnership of M and a corporation, relying upon the credit of both, and both received the goods and had the benefit of them, they may be jointly sued therefor.—*Cleveland P. Co. v. Courier Co.*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 556.

149. PARTNERSHIP—Surviving Partner.——In an action by an administrator on a note given to him by the surviving partner of his intestate it appeared that the note was given for advances made by the decedent to the partnership, it was held that the note was a charge upon the partnership assets, and defendant was only liable for his half of any deficiency of said assets.—*Turner v. Turner*, Ky. Ct. App., Oct. 13, 1887; 5 S. W. Rep. 457.

150 PATENT—Assignment — Jurisdiction. —— An inventor assigned one-third of his invention to another. The patent office divided the invention into three patents. The assignee claimed one-third interest in each of the patents: *Held*, that the question was one of purely patent law, of which the United States circuit court had jurisdiction.—*Puetz, Jr. v. Bransford*, U. S. C. C. (Mo.), Sept. 30, 1887; 32 Fed. Rep. 318.

151. PILOTAGE—Statute.——Construction of California statutes relative to the fees of pilots and their right to charge half pilotage to vessels which decline their services.—*The Alameda v. Neal*, U. S. C. C. (Cal.), Aug. 1, 1887; 32 Fed. Rep. 331.

152. PLANK ROAD COMPANIES—Repairs— Injunction.—A bill may be filed against a plank road company asking an injunction against taking toll while the road is out of repair, but the injunction should not be granted when the road has been repaired at great expense after the filing of the bill.—*People v. Grand, etc. Co.*, S. C. Mich., Oct. 6, 1887; 34 N. W. Rep. 250.

153. PLEADING—Conspiracy.——A complaint, charging conspiracy by defendants to control the coal trade of a city, mentioning certain overt acts, and charging injury to the plaintiff therefrom, states a cause of action.—*Murray v. McGarigle*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 522.

154. PLEADING—Demurrer.——Where a pleading denies in effect the allegation a demurrer is properly overruled.—*Brown v. West*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 80.

155. PLEADING—Denying Title — Estoppel. —— In an action for specific performance of a contract to purchase land, wherein plaintiff alleged that it had acquired and paid the owners for the title, the defendant, by denying that the act vested the title thereby in the complainant, admits that the complainant paid therefor, and the purchaser cannot question the title.—*City of Brooklyn v. Copeland*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 451.

156. PLEADING—General Denial—Contributory Negligence.——Where, in a suit for damages caused by defendant's negligence, defendant pleads a general denial, he can prove contributory negligence on the part of the plaintiff.—*Fernbach v. City of Waterloo*, S. C. Iowa, Oct. 15, 1887; 34 N. W. Rep. 610.

157. PLEADING — Indictment — Variance. —— At the trial of an indictment for threatening to accuse of a crime "one Frank E. White," the evidence showed that the threats were made to one Frank A. White: *Held*, a fatal variance.—*Com. v. Buckley*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 368.

158. POOR—Poor Laws — Husband and Wife.——A wife cannot recover under the poor laws of Massachusetts for supporting the father of her husband, he being a pauper.—*O'Keefe v. City of Northampton*, S. J. C. Mass., Oct. 20, 1887; 13 N. E Rep. 382.

159. PRACTICE—Continuance— Mode of Trial.——An equity case cannot be continued for the purpose of trial when one party objects until the mode of trial has been determined and made a part of record, under Iowa laws.—*Ellwood v. Price*, S. C. Iowa, Oct. 22, 1887; 34 N. W. Rep. 618.

160. PRACTICE—Trial—Remarks of Counsel. —— The court acts properly in not allowing the counsel to introduce by way of argument his knowledge of the case outside of the evidence before the jury.— *Amperse v. Fleckenstein*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 564.

161. PRINCIPAL AND SURETY—Officer—Bond.— Where money due to A as county clerk comes into his hands after the expiration of his term of office, and is misapplied by him, the sureties on his official bond are not liable.—*People v. Toomey*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 521.

162. PROMISSORY NOTE — Illegality. —— Where an agreement to discontinue a prosecution for embezzlement is a part of the consideration for a note, the note is void.—*Fernekes v. Bergenthal*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 238.

163. QUIETING TITLE — Religious Society.—— A religious society which has long had possession of a building on the town common, using it for purposes of worship, the town only occasionally exercising the privilege of ringing the bell, has no estate in the property that will enable it to maintain a bill to quiet title.—*Orthodox, etc. Soc. v. Town of Greenwich*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 380.

164. RAILROADS — Killing Stock—Contributory Negligence.——Where plaintiff put his mule into his stable, leaving it open to let the mule go to a watering place near by to drink, and he was absent about twenty minutes, and the mule wandered on the track and was killed by the negligence of persons in charge of a train, the plaintiff was not guilty of contributory negligence.—*Doran v. Chicago, etc. Co.*, S. C. Iowa, Oct. 25, 1887; 34 N. W. Rep. 619.

165. RECEIVER—Corporation—Judgment.——A judgment obtained on a new trial after reversal on appeal against a corporation, which in the meantime had been dissolved and placed in the hands of a receiver, does not bind the assets in the hands of the receiver, he not having been made a party.—*People v. Knickerbocker, etc. Co.*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 447.

166. RECORDS—Copying.—— The register of deed will not be compelled by *mandamus* to allow a private party to copy all the records in his office.—*Cormack v. Wolcott*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 245.

167. REHEARING.——An application for rehearing not made during the term when final decree was entered comes too late.—*The Comfort*, U. S. C. C. (N. Y.), Oct. 26, 1887; 32 Fed. Rep. 327.

168. SALE—Trial—Return to Vendor.——Where machinery is sold on approval, and after trial vendee find

it unsatisfactory and notifies the vendor, he is not bound to return it to the vendor in the absence of an express contract.—*Exhaust V. Co. v. Chicago, etc. R. Co.*, S. C. Wis., Oct. 11, 1887; 34 N. W. Rep. 509.

169. SALE — Warranty—Notice —Waiver.——Where a harvester is sold by A to B and the written warranty requires B to notify the manufacturers, and A sets up the harvester and agrees to notify the manufacturers of its defects, a notice by B is waived.—*Acker v. Kimme*, S. C. Kan., Oct. 8, 1887; 15 Pac. Rep. 248.

170. SCHOOL DISTRICTS—Formation—Mandamus.——*Mandamus* is the proper remedy to compel the formation of a new school district under the law providing for such district in territory lying in three or more townships and in three or more school districts.—*Trustees of Schools v. People*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 526.

171. SCHOOLS —Prudential Committee—Services.——A prudential committee of a school district holds over upon failure to elect their successors. Where a *de facto* committee furnishes labor and materials in good faith, and the district accepts and uses them, it is bound to pay therefor.—*Rowell v. School District*, S. C. Vt., Oct. 20, 1887; 10 Atl. Rep. 754.

172. SCHOOLS — Trustees — Piano.——The board of trustees of a graded school can purchase a piano for the use of a high school.—*Knabe v. Board of Education*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 568.

173. SEARCH WARRANT.——A search warrant issued under the laws of Massachusetts, authorizing search for intoxicating liquors, may be executed in the nighttime.—*Commonwealth v. Hinds*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 397.

174. SHIPPING—Master—Towage.——The master of a barge laden with lumber and waterlogged contracted with a tug to tow her 275 miles to her destination at eight times the usual price, the barge not being in immediate danger and it being possible to unload it. Its owner was within easy reach of mail or telegraph. *Held*, that the owner of the barge was not liable on the contract.—*Botsford v. Plummer*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 569.

175. SPECIFIC PERFORMANCE—Verbal Authority.——Where the evidence shows that the principal verbally authorized her agents to sell the land, and that she subsequently said she was satisfied with the sale, specific performance of the contract will be decreed.—*Joyce v. Alliel*, S. C. Iowa, Oct. 19, 1887; 34 N. W. Rep. 613.

176. STATUTES—Repeal by Implication.——If the continuance in force of any part of a former statute would destroy any part of a new, such part of the former statute is repealed, though the new statute says such former statute is continued in force.—*Pennsylvania Co. v. Dunlap*, S. C. Ind., Oct. 15, 1887; 13 N. E. Rep. 403.

177. SUNDAY—Pleading—Indictment.——In an indictment in violation of the Sunday laws of Massachusetts, it is not necessary to negative the exceptions made in those laws.—*Commonwealth v. Shannihan*, S. J. C. Mass., Oct. 19, 1887; 13 N. E. Rep. 347.

178. TAXATION — Agricultural College —Statutes.——The property of an agricultural college, consisting of a farm and stock and used in the education of youth, is not subject to taxation in Massachusetts.—*Mt. Hermon's Boys' School v. Town of Gill*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 354.

179. TAXATION—Abstract Books.——Abstract books have no taxable value, having no intrinsic value.—*Peny v. City of Big Rapids*, S. C. Mich., Oct. 13, 1887; 34 N. W. Rep. 530.

180. TAXATION — Oath to Inventory—Penalty.——A party is not liable to the penalty for refusing to swear to the inventory of his taxable property, unless prior thereto the assessor shall inform him of the valuation put thereon, and notify him that he may appear before the board of equalization to have it reduced.—*Marion Co. v. Galvin*, S. C. Iowa, Oct. 19, 1887; 34 N. W. Rep. 617.

181. TAXATION —Personal List—Protest.——Personal taxes paid under protest may be recovered when the lists were not certified to, nor signed by, the listers, and when no minute was made by the town clerk of the time they were lodged in his office.—*Bundy v. Town of Wolcott*, S. C. Vt., Oct. 22, 1887; 10 Atl. Rep. 756.

182. TAXATION — Railroads — Valuation.——A valuation of railroad property by the State board of equalization is valid, though other property is assessed at a lower rate by the town assessors, and such valuation can only be assailed for fraud or want of jurisdiction.—*Illinois, etc. R. Co. v. Stookey*, S. C. Ill., Sept. 28, 1887; 13 N. E. Rep. 516.

183. TAXATION—Sale—Subsequent Taxes.——In a suit in ejectment by the holder of a tax-title, the production of the tax deed is *prima facie* evidence of title and entitles the holder to possession without proof that he has paid the subsequent taxes.—*Beard v. Sharrick*, S. C. Mich., Oct. 20, 1887; 34 N. W. Rep. 585.

184. TAXATION — Sale — Notice. —— A sale for taxes must show the service and return of the notice required, and a recital in the decree that proper notice was given is not conclusive, and the original notice may be introduced, or in case of its loss secondary evidence of its contents may be given. In case of death of the owner, a notice directed to his estate is not sufficient.—*McGee v. Fleming*, S. C. Ala., June 30, 1887; 3 South. Rep. 1.

185. TENANT AT WILL—Notice.——The notice requisite under the statute of New Hampshire to determine a tenancy at will may require the tenant to quit at any time therein named.—*Stickney v. Burke*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 69.

186. TENDER — Effect.——If before a suit brought, a debtor tenders a sum of money absolutely, he will be relieved of all interest and cost unless judgment is rendered against him for more that the sum tendered. If the tender is made after the suit is brought he will not be so relieved unless he pays the money into court or agrees to submit a judgment therefor.—*Coglan v. South Carolina R. Co.*, U. S. C. C. (S. Car.), Oct. 1887; 32 Fed. Rep. 316.

187. TRESPASS — Damages —Lease—Description—Statute of Frauds.——In an action of trespass for taking marble from a quarry, if no circumstances of fraud occur the measure of damages is the value of the marble. A farm is sufficiently described as "Rose Hill," if many persons knew the place by that name. Parol evidence to identify property specified in a lease is competent under the statute of frauds.—*Dougherty v. Chesnutt*, S. C. Tenn., Sept. 27, 1887; 5 S. W. Rep. 444.

188. TRESPASS — To Try Title — Plea —Mortgage—Receiver.——In an action of trespass to try title defendant cannot, under a special plea that he holds under foreclosure of one mortgage, claim title under foreclosure of another mortgage. Upon a bill praying a receiver of mortgaged property, the court cannot authorize the receiver to take charge of property not included in the mortgage.—*St. Louis, etc. Co. v. Whitaker*, S. C. Tenn., Oct. 18, 1887; 5 S. W. Rep. 448.

189. TRUST — Evidence — Waters and Water-courses. ——Declarations and admissions by the grantor of a trust deed, subsequent to the deed, are not made competent as against the trustee by the fact that such grantor is one of the *cestuis que trust*. Rulings upon waters and water-courses. — *Warren v. Carey*, S. J. C. Mass., Sept. 22, 1887; 4 N. Eng. Rep. 867.

190. TRUST—Husband and Wife—Statute—Judicial Notice.——Where a husband executes and delivers to his wife, notes for his indebtedness to her, such notes constitute a declaration of trust in her favor, and will be enforced against his estate in a proceeding between her and his administrator, the rights of creditors not being in issue.—*Templeton v. Brown*, S. C. Tenn., Oct. 13, 1887; 5 S. W. Rep. 441.

191. VOTERS—Domicile—Public Institution.——An inmate of the Soldiers' and Sailors' Home at Bath, conditional on the judgment of the trustees that he is unable o support himself, does not acquire a residence fo

voting purposes in Bath.—*Silvey v. Lindsay*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 144.

192. VENDOR—Lien—Assignment for Creditors.——An assignment for the benefit of creditors in Iowa, defeats a vendor's lien, which is not reserved by instrument duly acknowledged and recorded.—*Prouty v. Clark*, S. C. Iowa, Oct. 21, 1887; 34 N. W. Rep. 614.

193. VENDOR AND VENDEE—Earnest Money—Recovery of.——A vendee cannot refuse to accept the title, lest it may be affected by debts of the vendor, when the vendor, now deceased, left $10,000 of personal property and nearly three years have elapsed since an administrator was appointed.—*Moser v. Cochrane*, N. Y. Ct. App., Oct. 4, 1887; 13 N. E. Rep. 442.

194. VENDOR — Vendee — Married Woman — Improvements.——The title bond of a married woman confers no title legal or equitable to the land. The vendee in such a case is entitled to the difference between the value of his improvements and lawful charges against him for rents and profits.—*Burch v. Jones*, Ky. Ct. App., Oct. 13, 1887; 5 S. W. Rep. 408.

195. WAREHOUSE RECEIPT—Negotiability—Statute.—Construction of Kentucky laws relative to warehouse receipts and their negotiability.—*Western Bank v. Marion County, etc. Co.*, Ky. Ct. App., Oct. 22, 1887; 5 S. W. Rep. 458.

196. WARRANTY — Assessment — Evidence. —— In an action for breach of covenant of warranty by failure on assessment, the defendant cannot prove by parol evidence that the plaintiff agreed to pay the assessment himself.—*Simaovich v. Wood*, S. J. C. Mass., Oct. 20, 1887; 13 N. E. Rep. 391.

197. WATER—Water-courses—Taxation. ——Rights in reservoir of water are real estate, and taxable where the land is situated. What is competent evidence of such rights.—*Winnipiseogee, etc. Co. v. Gilford*, S. C. N. H., July 15, 1887; 5 N. Eng. Rep. 88.

198. WILL—Construction—Dower— Heirs. —— Where large interests in real and personal estates are given to the widow by a will, such provision is in lieu of dower, When a class of persons described as heirs are held to be children, the presumption is in favor of them against intestacy.—*Anthony v. Anthony*, S. C. Err. & App. Conn., September, 1887; 5 N. Eng. Rep. 41.

199. WILL—Construction—Legatees.—— Where a testator directs his estate to be divided among different parties, naming them, adding after the last name "whom I hereby appoint sole executor of this, my will," there being no conjunction between any of the names, the last named party is executor and also an equal legatee.—*Greenough v. Cass*, S. C. N. H., July 15, 1387; 10 Atl. Rep. 757.

200. WILL—Mental Capacity — Evidence. —— Where the evidence as to the mental capacity of the testator is conflicting, the verdict will not be set aside as contrary to the evidence.—*Shevalier v. Seager*, S. C. Ill., Sept. 27, 1887; 13 N. E. Rep. 499.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERY NO. 29.

Water-works owned by private company; fire occurs in the city; manager in charge at office in the city away in the country; engineer absent from his post in the woods; no water to extinguish the fire; large loss over indemnity by insurance company. Can the water-works company be sued successfully by any tax-paying citizen who sustained loss, or is the city liable? What would be the measure of damages? Please cite authorities from Missouri, if possible. O.

QUERIES ANSWERED.

QUERY NO. 27 [*25 Cent. L. J. 479.*]

A hires to teach a school for eight school months in Marion County, Kansas. He dismissed school on election day, thanksgiving day and Washington's birthday, and demands pay in full for said eight months, which district board refuses to advance, claiming A had a right to dismiss school on those days without permission of board, but that he was not entitled to pay therefor. He (A) also claims that teachers are also entitled to pay for Christmas and New Years also when taken as holidays. H.

Answer. We suppose the question refers entirely to the subject of the holidays, and that there is no controversy about *advancing* money prior to the completion of the contract. If it is customary not to teach school on those days, such custom is a part of A's contract, and A can claim his pay for those days, though the school was then closed. Lawson's Usages and Customs, 394, § 198. Of course, it is understood that A's contract is silent about the holidays. Four of the days mentioned are recognized as holidays in Kansas. Comp. Laws Kan. (Dassler) 1885, p. 125, § 571. We think A will be able to prove he is in the right. In fact, the board admits the only proposition he is required to prove. M. S.

RECENT PUBLICATIONS.

OF THE LAW AND PRACTICE in Actions Against Municipal Corporations for Negligence in the Care of Highways. By William W. Morrill, Author of "Competency and Privilege of Witnesses." New York: S. S. Peloubet, Law Publisher and Bookseller, 80 Nassau Street. 1887.

This is not a treatise on the law of negligence, nor yet on that relating to municipal corporations. If it professed to treat either of these broad subjects within the limits of a small volume, we would, without further examination, pronounce it imperfect and worthless, for no powers of condensation could force into a volume of its dimensions all the law necessary to be known which relates to either subject. The author, however, has attempted no such impossibility, but has given us a very favorable work on the law common to both these subjects, the law of negligence applicable to municipal corporations, or the liability of such corporations for acts of negligence.

This book is especially welcome in these latter days when cities spring up in a single night, and when all litigation seems to be running to damage suits for personal injuries. For the rest, the book is well written and well arranged. We observe one feature in the arrangement, which is new to us in print, although very familiar and highly approved by us in the preparation of copy for the printer. In this book the citations do not appear in foot-notes, but directly follow the point in the text in which they are referred to, but are in different type, and in printers' phrase, "indented." We think the innovation an improvement and worthy of imitation.

St. Louis, November 25, 1887.—No. 5

The price of this addendum is two dollars per year, to subscribers of the Central Law Journal only. It is not issued every week, but as often only as there are sufficient opinions filed to fill at least one page, and will contain abstracts of all opinions filed in the St. Louis and Kansas City Courts of Appeals.

ST. LOUIS COURT OF APPEALS.

November 22, 1887.

WITNESSES — DIVORCE — COMMUNICATIONS BETWEEN HUSBAND AND WIFE CANNOT BE TESTIFIED TO BY EITHER.—Neither husband nor wife is a competent witness to prove communications from one to the other in the absence of third parties. The fact that the communications consist of opprobious epithets, which might furnish ground for divorce on the score of intolerable indignities, does not alter the rule of evidence. Affirmed. Opinion by LEWIS, P. J. No. 3,885.—*Ayres v. Ayres.*

AFFIRMED FOR FAILURE TO PROSECUTE.—Opinion by LEWIS, P. J. No. 3,986.—*Sims v. St. Louis, Keokuk and Northern R. Co.*

CONTRACTS—ACCEPTANCE OF PROPOSAL QUESTION OF LAW FOR THE COURT—WHAT WILL AMOUNT TO ACCEPTANCE OF PROPOSAL, AND WHAT NOT.—1. What acts or words amount to an acceptance of an offer, when such acts or words are unequivocal, is a question of law and not of fact. 2. An unconditional offer, unconditionally accepted, ripens into an agreement as soon as the acceptance takes place, even though the fact of acceptance is unknown to the party making the offer. But in order to have that effect the acceptance must be shown by some overt act, and not by a mere uncommunicated assent. 3. Thus, where A proposes to B the relinquishment of certain rights upon payment of a certain sum of money, the mere fact that B deposits the sum in bank, the same remaining still under his control, and writes upon the written proposal, which he also retains in his possession, the word accepted, does not constitute an unconditional acceptance of the offer, although it were otherwise if B had paid the money to A, or to his credit absolutely, or had delivered the written offer with his acceptance to A. Reversed and remanded. Opinion by LEWIS, P. J. THOMPSON, J., concurs. ROMBAUER, J., concurs in result. No. 379. —*Lancaster v. Elliot.*

PRACTICE IN TRIAL COURTS—EXTENSION OF TIME OF PLEADING—ORAL MOTIONS INADMISSIBLE.—1. The extension of time within which the statute requires a pleading to be filed is discretionary with the trial court, and where it does not appear that such discretion was abused the appellate courts will not interfere. 2. Oral pleadings are inadmissible in courts of record, and an appellate court cannot review the propriety of the action of the trial court in overruling a motion to strike out parts of a pleading where no written motion is preserved in the record. Affirmed. Opinion by ROMBAUER, J. No. 3,872.—*Austin v. Boyd.*

LANDLORD AND TENANT—LIABILITY TO REPAIR—WHEN TENANT STANDS IN SAME POSITION AS STRANGER.—1. The landlord is under no implied obligation to repair premises let as far as his tenant is concerned, nor does the letting imply an agreement on his part that the premises are fit for occupancy. 2. As to third persons, the landlord is responsible for injuries caused by the ruinous parts of such part of the premises as are in his possession, on the ground that each person is bound to use his property in such a manner as not to endanger, by the negligent use thereof, the person or property of another. 3. *Held*, by a majority of the court, that where part of a tenement house is let to a tenant, but its main wall remains in the exclusive possession of the landlord, the tenant as to such main wall occupies the position of a stranger, and may recover from the landlord damages for injuries caused to his property by the landlord negligently permitting the downfall of the wall. Affirmed. Opinion by ROMBAUER, J., THOMPSON, J., concurring. LEWIS, P. J.. dissenting, holds that while the rule is correctly stated, its application to the facts of the case is erroneous, and the decision thus is opposed to a decision of the supreme court, warranting a certification of the case to that tribunal for final determination. Case certified. No. 3,852.—*Ward v. Fagan.*

PRACTICE IN CIVIL CASES — JUDGMENT UNSUPPORTED BY EVIDENCE—MEASURE OF DAMAGES.—1. A judgment in favor of a party who has the burden of proof cannot stand unless supported by evidence, and if not thus supported must be vacated, even if no other question of law is raised upon the record. 2. The measure of damages is a question of law, and where the damages awarded are unsupportable on any legal theory the judgment is erroneous. Reversed and remanded. Opinion by ROMBAUER, J. No. 3,892.— *Blackwell v. Adams.*

PRACTICE IN CIVIL CASES — JURISDICTION—ERRORS REVIEWABLE ON APPEAL—ACTION ON DOMESTIC JUDGMENT.—1. The question of jurisdiction is essentially different from the question whether jurisdiction has been properly exercised. 2. The point that the petition does not state facts sufficient to constitute a cause of action may be raised for the first time on appeal. The defect is one shown by the record, and need not be preserved by bill. 3. An action is maintainable on a domestic judgment even within the time that it is enforceable by execution in such action; however, all the judgment defendants are necessary parties defendant, as their liability is joint. 4. A judgment is not a contract within the meaning of that term in the statute, which provides that all contracts which by the common law are joint only shall be construed to be joint and several. Reversed and remanded. Opinion by ROMBAUER, J. No. 3,896.— *Sheehan & Soles Transfer Company v. Simms.*

BUSINESS CORPORATIONS—STOCKHOLDER'S CONTRACT WHO SIGNS ARTICLES OF ASSOCIATION — CONTRACT WITH PROMOTER NO DEFENSE WHEN.— 1. A person who signs unconditionally articles of association of a business corporation, with a certain number of shares set opposite his name, thereby contracts to take the shares thus subscribed for, as soon as the corporation is organized, and to pay fifty per cent. of the amount subscribed in cash to the persons named as managers, prior to the recording of the articles. 2. A promoter of a corporation has no power to bind the company which is not then in being, by any contract he may make in obtaining a subscription. Agency presupposes an existing principal. The corporation may ratify such a contract, and thus become bound by it, or it may receive its benefit and thus become estopped to deny its validity, but in absence of

evidence that it did one or the orther, the promoter's contract is not binding on the corporation or its representatives. Affirmed. Opinion by ROMBAUER, J. No. 3,882.—*Joy. Assignee v. Manion.*

CONSTABLE — NATURE OF HIS TITLE TO GOODS SEIZED ON PROCESS—DECLARATIONS MERE HEARSAY WHEN.—1. A constable who seizes goods under a valid writ of attachment acquires in the goods thus seized a special property which will enable him if dispossessed to maintain replevin against anyone but the true owner, when the true owner is not the defendant in the attachment. 2. Unsworn declarations by the possessor of chattles, as to the character in which he holds the property are admissible in evidence only against him and parties claiming under him. They are not admissible against a stranger. Reversed and remanded. Opinion by THOMPSON, J. No. 3,868.—*Carroll v. Frank.*

RAILROADS — COMMON CARRIERS—LIABILITY IN ACTION ET DELICTU FOR NEGLIGENCE—LIABILITY UNDER SPECIAL CONTRACT—BURDEN OF PROOF—ERRONEOUS INSTRUCTION.—1. A common carrier may be sued in this State in an action of tort for injury caused by his negligence to goods intrusted to him for transportation. 2. Where, in such an action, it appears that the goods were transported under a special contract exempting the carrier from responsibility from damages caused by certain perils, and it is shown that the damages were caused by some excepted peril, the shipper or consignee cannot recover, unless he affirmatively shows that the carrier's negligence supervened in causing the loss. 3. Thus, in the case stated, where the excepted peril is the breakage of fragile goods, mere proof that the goods were delivered to the carrier in sound condition and redelivered by him in broken condition raises no presumption that they were injured by the carrier's negligence, as the goods might as well have been broken by the ordinary dangers of transportation, and an instruction which tells the jury that the law presumes negligence, from that fact is erroneous and misleading. Reversed and remanded. Opinion by ROMBAUER, J., LEWIS, J., concurs. THOMPSON, J., dissents and is of opinion that the decision is contrary to a decision of the supreme court. Case certified to the supreme court.

BENEVOLENT ASSOCIATION—SURRENDER OF BENEFIT CERTIFICATE WHEN COMPLETE RIGHTS OF NEW BENEFICIARY NAMED ATTACH, WHEN.—The laws of a benevolent association provided that the national association alone could issue benefit certificates, but gave to a member holding such certificate the exclusive right to change the beneficiary upon surrender of the certificate to the subordinate lodge and upon payment of a fee of fifty cents. A, the holder of such certificate, surrendered it to the subordinate lodge of which he was a member, paying the requisite fee, and requesting a new certificate to be issued, payable to another beneficiary. Before the surrender was communicated to the national association, A died. *Held*, that the surrender was complete, and that the rights of the new beneficiary named attached at once, A having done all that was in his power to consummate the transfer in his life time. Affirmed. Opinion by THOMPSON, J. No. 3,891.—*Susan Kirgin, Interpleader, v. Minerva Snodgrass.*

SPECIAL TAX-BILLS — PLEADING ORDINANCE — PLEADING DEFENSES—LIMITATION OF ACTION ON—SIGNATURE BY DEPUTY COMPTROLLER.—1. In pleading an ordinance, it is not essential to set it out in full, or to recite in detail the steps preceding its enactment. Generally, the statement that the ordinance was duly passed by an authorized body giving its purport, is sufficient. 2. The two years' limitation applicable to special tax-bills, begins to run from the date of the issue of the bill and not from the date of the completion of the work. 3. Special tax-bills must be countersigned by the comptroller, or if countersigned by his deputy must be signed in the comptroller's name by deputy, and a tax-bill which complies with neither of these requirements is not *prima facie* evidence of the owner's liability. 4. Courts can take no official cognizance that the duties of a municipal office that may be performed by deputy, in the absence of any legal provision warranting the office of deputy. Reversed. Opinion by THOMPSON, J. No. 3,877.—*Eyerman v. Payne.*

MISDEMEANORS — THREATENING LETTER NO STATUTORY OFFENSE—WHEN?—MEANING OF TERM —PROPERTY AS USED IN STATUTE.—1. The statute [Rev. Stat., § 1,526] provides that anyone who shall knowingly send a letter threatening * * * to do any injury * * * to the person or property of another, shall be adjudged guilty of a misdemeanor, etc. *Held*, that a letter threatening to publish one's name in the dead-beat book, the effect of which will be ruinous to his credit, etc., is not an offense within the purview of the statute. Credit and reputation are property in one sense, but not in the sense used in the law. 2. The statute expressly defines "personal property" as used in the law to mean goods, chattels, effects, evidences of rights of action and all written instruments by which any pecuniary obligation or any right or title to property, real or personal, shall be created, etc. Reversed and defendant discharged. Opinion by THOMPSON, J. No. 3,950.—*State v. Barr et al.*

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STATUTE OF FRAUDS—CONTRACTS.—1. The agreement for the purchase of the land being verbal, was within our statute of frauds, and was binding on neither the plaintiff nor the defendant. 2. The purchase of land is as much within the statute of frauds as a sale, and the policy of the law is to both protect the owners of land from being deprived of it without written evidence, and to prevent the purchase of land from being forced by perjury and fraud upon one who never contracted for it. Reversed. Opinion by HALL, J.—*Schlanker v. Smith.*

RAILROADS — FENCES — HIGHWAYS — PRIVATE ROADS.—1. In this State it is the duty of every railroad company to erect and maintain fences along the sides of its railroad, "everywhere outside of towns and cities except at public crossings and depot grounds." The exception, as to public crossings, includes highways *de jure* as well as highways *de facto*. 2. "Private roads" are so termed by the statute to distinguish them from public roads, which latter are maintained at the public expense. 3. § 6482, Rev. Stat., applies only to private roads established under the statute. 4. A railroad company is not required to fence across a mere private road which the public neither has the right to use, nor is actually using. Reversed. Opinion by HALL, J.—*Jenkins v. C. & A. R. R. Co.*